



**Salim v Bhinder Corporation Limited (Appeal E063 of 2023)
[2024] KEELRC 1827 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1827 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E063 OF 2023**

**AK NZEI, J
JULY 11, 2024**

BETWEEN

BISHAR LUBU SALIM APPELLANT

AND

BHINDER CORPORATION LIMITED RESPONDENT

*(An appeal against the whole judgment of Hon. Martin M. Wachira – SPM
in Mombasa CM-ELR Case No. 048 of 2022 delivered on 16th June 2023)*

JUDGMENT

J U D G M E N T

1. The Appellant was the claimant in Mombasa Chief Magistrate’s Court Employment Case No. 48 of 2022 whereby he had sued the Respondent herein claiming:
 - a. One month salary in lieu of notice.....kshs. 25,435.20
 - b. House allowance for 42 months at the rate of 15% of the basic salary (15/100x25,435.20x42)kshs. 160, 241.76
 - c. Unpaid leave days (1,219.80x21 x 3 years).....kshs. 76,847.40
 - d. Underpayment below the minimum wage (25,435.20-8,500) x42 monthskshs. 711,278.40
 - e. Compensation for unfair termination (25,435.20x12).....kshs. 305,222.40
 - f. Service pay (sksh. 25,435.20/2x3).....kshs. 38,152.80
 - g. Unpaid NHIF 500x42 monthskshs. 21,000



- h. Costs of the suit and interest.
 - i. Any other relief that the Court may deem fit to grant.
2. The Appellant had pleaded:-
 - a. that he was on 6/4/2018 employed by the Respondent, earning a basic salary of kshs. 8,500 per month, and worked continuously until 12/10/2021 when the Respondent verbally and unprocedurally terminated his employment.
 - b. that on 8/10/2021, the Appellant felt sick and was allowed by the Respondent's director, a Mr. Ahmed not to attend his work.
 - c. that when the Appellant arrived at work on 12/10/2021 and availed treatment notes, he was told by the Respondent's said director to surrender all the Respondent's property as his services were not needed; and was forced out of the premises.
 - d. that the Appellant was not allowed to take annual leave during the entire period of employment; during which he worked for extra hours without pay.
 - e. that the Appellant's monthly salary of kshs. 8,500 was below the provisions of legal notice No. 2 of 2019 which provided for a minimum wage of kshs. 25,435.20.
 - f. that the Appellant was not paid house allowance during the period of employment.
 - g. that the Respondent did not pay the Appellant's statutory deductions on NSSF and NHIF during the period of employment.
 - h. that termination of the Appellant's employment was wrongful and unlawful for want of a valid reason for the termination, that there was no termination notice, the Appellant was not paid his terminal dues, and that the Appellant was not accorded a fair hearing.
 - i. that termination of the Appellant's employment amounted to unfair labour practice.
 3. Documents filed alongside the Appellant's memorandum of claim included the Appellant's written witness statement dated 28/1/2022 and an evenly dated list of documents listing 3 documents. The listed documents were the Appellant's identity card, a demand letter and a copy of Legal Notice No. 2 of 2018.
 4. The Respondent entered appearance on 21/2/2022 and filed a Memorandum of Reply on 18/3/2022, denying the Appellant's claim and branding it fictitious.
 5. Further, the Respondent denied having employed the Appellant and labelled him a stranger. The Respondent further pleaded that the Appellant was at one time posted as a guard by Libra security Guards, which Firm was guarding the Respondent's showroom. That the Appellant's claim was frivolous, and that he was not entitled to any compensation.
 6. Documents filed alongside the Respondent's Memorandum of Reply included a written witness statement of Nyoha Daniel Kadenge dated 17/3/2022 and an evenly dated list of documents listing one set of documents, being invoices and cheques showing payment for security services to Libra Security Services company.
 7. At the trial, the Appellant adopted his filed witness statement, which basically replicates the averments made in his memorandum of claim, as his testimony. The Appellant told the trial Court that he lived in Likoni, and that he was a Security Officer. He denied having been employed by Libra Security Limited



or having been paid by them. He stated that he had been employed as a Salesman by the Respondent, earning a salary of kshs. 8,500, which was paid to him by the Respondent.

8. Cross-examined and re-examined, the Appellant testified that he had been employed by the Respondent and that his salary was being paid in cash, that he signed a book for it; and that the Respondent had two other employees, Wafula Charo and Peter (Mzee). That the Respondent sells cars, and that the Appellant had sold over 50 cars for the Respondent. That the Appellant's work was to introduce customers and to send them to Ahmed. It was the Appellant's testimony that he was, at the time of trial, working for Jubilee Security.
9. The Respondent called two witnesses, Effichar Ahmed (DW-1) and Nyoha Daniel Kadenge (DW-2). DW-1 testified that he was the Respondent's director, and that the Respondent had not employed the Appellant, who had been employed by Libra. That the Respondent had hired Libra Security Limited, which then send different guards/persons including the Appellant, to the Respondent. That the Appellant never did any other work for the Respondent other than guarding. That the Respondent did not pay any money to the Appellant, but paid Libra by cheques, kshs. 10,000 for one guard. That the Respondent had one guard during the day and another at night. That Libra told DW-1 that the guard was sick, and replaced him with another.
10. DW-2 told the trial Court that he was a clerk with the Respondent, and adopted his filed witness statement as his testimony. The witness testified that the Respondent had 4 employees who included himself, Lucy Musembi, Ronald Wafula and Mwangangi. That DW-2 knew the Appellant herein as a guard employed by Libra Security and taken to the Respondent as a guard. That the Appellant worked in 2017-2018, and was not given any other duty.
11. It was DW-2's further evidence that he used to write cheques to Libra Security; and that if the Appellant did not come to work, his employer would send another (guard).
12. The trial Court delivered its judgment on 16/6/2023 and dismissed the Appellant's claim with costs. The Court rendered itself as follows:-

“It is difficult for this Court to find that the claimant has proved that he was an employee of the Respondent. Therefore, issue no. 1 is answered in the negative.

Having found that there was no contract of employment between the claimant and the Respondent, it then follows that issues 2 and 3 become moot.

The upshot is that the claim by the claimant is dismissed with costs to the Respondent.”

13. Aggrieved by the aforesaid judgment, the Appellant preferred the present appeal and set forth ten grounds of appeal, which I summarize as follows: The learned Magistrate erred in law and fact by:-
 - a. shifting the burden of proof to the Appellant who had established a prima facie case that he was employed by the Respondent and dismissed unfairly from his employment.
 - b. finding that the Appellant was not an employee of the Respondent despite the Respondent admitting that the Appellant was working in its premises and that all its employees are not issued with employment contracts.
 - c. finding that there was no employer-employee relationship between the Appellant and the Respondent despite the Respondent failing to produce any document that Libra Security Guards had deployed the Appellant to work at its premises.



- d. failing to appreciate that the Respondent had failed to prove that it had an agreement for provision of security services with Libra Security Guards in its premises other than two cheques dated 7/6/2017 and 3/7/2017 which did not disclose what the Respondent was paying for.
 - e. failing to appreciate that the Respondent was the custodian of all documents regarding the Appellant's employment and bore high responsibility of producing the same, other than transferring the same responsibility to the Appellant.
 - f. finding that the Appellant failed to produce any document, yet the law recognizes oral contracts, which documents may not be available.
 - g. failing to appreciate that the Respondent's witness, Nyoha Daniel Kadenge, equally did not produce any documents to prove that he was the Respondent's employee, yet he admitted that he was employed by the Respondent.
 - h. proceeding on wrong principles and arriving to the finding that the Appellant was an employee of the Respondent.
 - i. disregarding the overwhelming evidence tendered by the Appellant to prove that he was entitled to terminal dues upon unlawful dismissal from work.
 - j. disregarding submissions made by the Appellant's Counsel on both law and fact.
14. The Appellant sought the following reliefs on appeal:-
- a. that the appeal be allowed.
 - b. that the judgment of the trial Court delivered on 16/6/2023 against the Appellant be set aside.
 - c. that judgment be issued by this Court in favour of the Appellant based on facts and law.
 - d. costs of the appeal be awarded to the Appellant.
15. This is a first appeal, and the evidence adduced in the trial Court is before this Court for fresh evaluation. This Court, however, takes cognizance of the fact that it never saw or heard the witnesses first hand. In my view, the following issues fall for determination:-
- a. whether the Appellant was an employee of the Respondent; and if so,
 - b. whether the Appellant's employment was unfairly terminated by the Respondent.
 - c. whether the Appellant is entitled to the reliefs sought in the trial Court.
16. On the first issue, it must be noted that although the *Employment Act* recognizes oral contracts of employment, a claiming employee and/or alleged employee is primarily obligated to prove and/or demonstrate the existence of an employment contract and/or an employer/employee relationship based on that oral contract. In cases of oral employment contracts where no evidential documents of whatever nature are available to a claiming employee, such an employee can call and present credible corroborative oral evidence. Such evidence is not hard to get where the claim is a valid one. The same can be adduced by the employee's former work colleagues, people who used to see the employee working for the Respondent/employer in the manner and capacity that he alleges, neighbours at work or even by the employee's family members who knew that he worked there and actually used to see him working there.
17. The Appellant chose not to call and/or to present any corroborative evidence. It is only after the existence of an employer/employee relationship is demonstrated by the employee and/or admitted by



the alleged employer that the issue of custodianship of documents of employment by the employer, where applicable, can arise.

18. The primary duty of demonstrating and/or proving the existence of an employer/employee relationship is always on the claiming/alleging employee, unless the employer admits having employed the alleged employee.
19. The Appellant testified at the trial that he had been employed as a salesman by the Respondent company, which sells cars, and that he sold over 50 cars for the Respondent. He did not present anything in evidence to show that he sold any cars or even that he was a salesman or had worked as a salesman. No mention of any customers that he sold cars to was made, and no form of evidence, oral or documentary, was presented at the trial in that regard. Indeed, the Appellant testified that his work was to refer customers to the Respondent. In what capacity then did he do that, as a salesman or as a security guard, and on what arrangement, if any, did he do that.”
20. It is further to be noted that the Appellant testified before the trial Court that he was a security Officer working with Jubilee Security. He did not tell the Court when he stopped working as a Salesman and when he started working as a security guard/officer.
21. I return a finding that the Appellant did not demonstrate that he was an employee of the Respondent, and uphold the trial Court’s finding in that regard. In the absence of an employer/employee relationship, the second and third issues must collapse.
22. The appeal herein fails, and is hereby dismissed. Each party will bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH 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

7

Appeal e063/2023

