



Winstar Security Guards Limited v Wanyonyi (Employment and Labour Relations Appeal E013 & E024 of 2023 (Consolidated)) [2024] KEELRC 1944 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1944 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS
APPEAL E013 & E024 OF 2023 (CONSOLIDATED)

HS WASILWA, J

JULY 25, 2024

BETWEEN

WINSTAR SECURITY GUARDS LIMITED APPELLANT

AND

GODWIN SIMIYU WANYONYI RESPONDENT

JUDGMENT

1. This Judgment is in respect of two Appeals; Appeal Number E013 of 2023 and Appeal No. E024 of 2023, mutually lodged by the Appellant herein against the Respondent. Both Appeals emanate from Nakuru Chief Magistrates decisions in CMELRC case Number 67 of 2019.
2. The first Appeal was filed on 11th April, 2024 against the Judgment of the Honourable K.I Orange(PM) delivered on the 12th May, 2023 in CMELRC Cause No. 67 of 2019; Godwin Simiyu Vs Winstar Security Guards Limited. The grounds of Appeal are as follows; -
 1. The Honourable Principal Magistrate withheld his judgement for more than a year without justification and when it was delivered, it was against the weight of evidence tendered and it was delivered in case Number CMERLC No. 67 of 2019.
 2. The Honourable Principal Magistrate erred in law and in fact in finding that the Respondent was unfairly terminated.
 3. The Honourable Magistrate erred in law and in fact by failing to find the Respondent relied on a forged Form Four Certificate to seek employment with the Appellant in the first place.
 4. The Honourable Principal Magistrate erred in law and fact by failing to hold that the Respondent absconded from duty.



5. The Honourable Principal Magistrate erred in law and in fact by failing to find that the Respondent derived himself of the due process of hearing by instituting the claim in Court barely days after absconding.
 6. The Honourable Principal Magistrate erred in law and fact by awarding compensation for Notice, overtime, underpayment and overtime.
 7. The Honourable Principal Magistrate erred in law in disregarding the evidence of Kenya National Examination Council and the Appellant's Employment policy on level of education of employees.
3. The Appellant prayed for the Appeal to be allowed and the subordinate Court's Judgement be overturned and the entire suit be dismissed with costs.
 4. The Second Appeal No. E024 of 2023, was filed by the Appellant on 11th September, 2023 against the Ruling of the Honourable I. Orange (CM) delivered on 6th September, 2023. It is based on the following grounds; -
 1. That the Honourable Chief Magistrate erred in-law and in fact by finding that the Respondent was entitled to Orders of Review on the judgement delivered on 12th May, 2023.
 2. That the Honourable Chief Magistrate erred in law and in fact by finding and holding that the Respondent was entitled to compensation under section 49 (c) of the Employment Act of between 1 and 12 months' salary for the unfair termination of services.
 3. That the Honourable Chief magistrate erred in finding that the Respondent was entitled to further compensation of Kshs. 123,994.48, an amount which the Respondent did not pray for in his Application dated 31st May, 2023 or on the original Memorandum of claim.
 4. That the Ruling delivered on 6th September, 2023 fell short of the required standard for failing to appreciate or consider the Appellant's submissions.
 5. That the Honourable Court erred in law by sitting in his own Appeal.
 6. That the Honourable Chief Magistrate erred in law by reviewing a judgement which had been appealed against in Nakuru ELRC Appeal Number 13 of 2023; Winster Security Guards Limited Vs Godwin Simiyu Wanyonyi.
 5. The Appellant prayed for the Ruling delivered on 6th September, 2023 to be set aside and the Application dated 12th May, 2023 be dismissed with costs.

Background facts.

6. The facts of this case is that the Respondent had instituted this claim against the Appellant in subordinate Court serialized as CMERLC case Number 67 of 2019, Alleging that his termination was unfair and seeking compensation for the unfair termination.
7. The basis of the trial court case is that the Respondent herein was employed by the Respondent on 16th September, 2018 as a night Guard till 15th March, 2019, earning a monthly salary of Kshs. 12,000, which was later increased to Kshs.13,000 with effect from 1st November, 2018 and continued earning this amount till his termination.
8. It is stated that the Respondent used to clock in at 6pm and clock out at 6am working overtime, which was not paid for. That the circumstances leading to his termination was that on 15th March, 2019 after



work, he went home as usual only to receive a call at 9am from the Operations manager, asking him to go back to work and upon arrival, he was informed that a Samsung Charge, Masking tape and Scrapper worth Kshs. 350, Kshs. 450 and Kshs. 250 respectively and that he was the main suspect. Subsequently, he was informed that his services were no longer needed and summary dismissed without any notice, reason and procedure.

9. During the pendency of his employment, the Respondent states that he was not paid house allowance, was under paid, always worked during all holidays without compensation and also that he was only allowed three days off per month instead of 4 days provided under the law.
10. In defence, the Appellant herein stated that the Respondent was tasked with guarding a construction site in Kisulululi areas and on the night of 14th March, 2019, some items went missing where the night and day guard were suspected. That a hearing was scheduled for 18th March, 2019 and in preparation for the hearing, it was discovered that the KSCE certificate was suspect and the Appellant requested for original certificates, however the Respondent deserted duty and never returned back. In addition, that the Respondent disappeared with the Respondent's uniform and Identity card worth Kshs 15,000.
11. The trial case was heard and after hearing, the trial court found the termination was unfair and awarded compensation of Kshs 123,994. 48 being 15 days salary not paid for the month of March, 2019, one month pay in lieu of notice, underpayments and overtime pay.
12. Dissatisfied with the judgement of the Court the Respondent herein by the Application of 31st May, 2023, sought to review the judgement and asked to be awarded compensation for the unfair termination under section 49(c) of the Employment. Consequently, the Honourable magistrate awarded the Respondent compensation under the section 49(c) of the Employment Act of Kshs 123,994.48.
13. It's the Judgement of the Subordinate Court and the Ruling reviewing the Judgement that caused the Appellant to file these Appeal.
14. Directions were taken for the Appeals to be canvassed by written submission. However, the Respondent did not file submissions.

Appellant's Submissions

15. The Appellant began by citing the case of *Selle & Another Vs Associated Motor Boat Co. Limited & Others* [1968. E.1 123, where the Court held that:-

“ a first Appellant court is mandated to reav-evaluate the evidence before the trial curt as well as the judgement and arrive at its own independent judgment on whether or not to allow the Appeal. A first Appellate Court is empowered to subject the whole of evidence to a fresh and exhaustive scrutiny and make conclusions about it bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”
16. Accordingly, it was submitted that in this case, the Respondent was employed by the Respondent as a night guard and while on duty some items were reported missing and upon investigations, the two night and day guard were summoned. Before they could attend the Appellant for interrogation, the Appellant, while perusing through the Respondent's file, noted that his KCSE certificate was suspicious and asked him to bring along his original certificate during hearing for verification, however, the Respondent refused to attend hearing and instead deserted duty.
17. It was argued that the Appellant herein subjected the Respondent's KCSE certificate to verification with the National Examination Council (KNEC), who confirmed that the said certificate was a forgery,



- a fact, which was confirmed by the Respondent during cross examination, as he admitted to have dropped out of school after class 8. It was argued that despite bringing this fact to the attention of the trial Court, the Court ignored the issue for the reason that it was not subjected to police scrutiny, a decision that was contrary weight of evidence on record and the testimony of the Respondent.
18. It was argued that the fate of an employee that submits forged certificates is summary dismissal as was held in Janet Melly Otieno V Kenya Ports Authority{2018] eklr and the case of Thamusa H Mwaruwa Vs Kenya Ports Authority[2017] eklr. Hence the only resultant outcome of the forged KCSE certificate ought to have been summary dismissal of the Respondent and dismissal of the suit but not an award as held by the trial Court.
 19. It was also argued that an employee that absconds duty should not expect to be subject to disciplinary procedure by the Employer as was held in Silas Wandera Vs Principal Bristar Girls Hifg Achool[2020] eklr. In any event that the Respondent did not discharge its burden of proving that he was unfairly terminated to warrant the award given.
 20. Regarding Appeal 24 of 2023, the Appellant submitted that the trial Court reviewed its judgement and came up with two judgements contrary to the law. Moreover, that the said Judgement was reviewed when an Appeal had already been preferred before this Court, Hence the review was unprocedural, irregular and set bad precedent that calls for an intervention by this Court. In support of this, the Appellant relied on the case of Multichoice Kenya Limited Vs Wananchi Group Kenya Limited & 2 Others [2020] eklr, where the Court held that;-

“it is now accepted that both civil procedure and Court of Appeal rules did not countenance simultaneous proceedings of review and Appeal before two different Courts at the same time.”
 21. It was argued that the Review Application sought for payment of maximum compensation for unfair termination of Kshs 193,724.40 but the trial Court awarded Kshs 123,994.48, an amount that was without any basis as to the amount of salary relied upon in arriving at the said amount and the number of months awarded.
 22. Moreover, that the trial Court erred in awarding damages in a review Application. In this, he relied on the case of National Bank of Kenya Limited Vs Ndungu Njau [1997] eklr, where it was held that;-

“a review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evidence and should not require an elaborate argument to be established. It will not be a sufficient grounds for review that another judge would have taken a different view of the matter, Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law.”
 23. It was submitted further that the Respondent herein was on a one-year contract as admitted at page 102 of the record of Appeal, therefore that the Court should not award compensation for a period more than his contractual period.
 24. In conclusion, the Appellant urged this court to evaluate the facts and the law on the subordinate court matter and allow the Appeals.
 25. I have considered all the evidence and submissions of the parties. As already submitted, this being a 1st appeal to this court, this court is mandated to re-evaluate the evidence on record afresh and reach its own finding accordingly.



26. From the record, the Respondent was employed by the Appellant on 16/9/2018 as a night guard until 15th March 2019 a period of barely 6 months. His salary was 13,000/= at time of termination.
27. He averred that he was terminated unfairly after being accused of theft at the work place and that he was not subjected to any disciplinary process.
28. He was cross examined about a form IV certificate he had used when employed and he denied submitting any form 4 certificate indicating that he is a standard 8 drop out. He also denied that he was ever asked to produce his original certificate. He also denied disappearing with the Appellant's uniform. He indicated that he returned it to his supervisor.
29. The Appellants testified that they had employed the Respondent from September 2018 to March 2019 when he absconded duty after being summoned to explain some theft occurrence. The Appellants also averred that the Respondent grew cold feet after being asked to produce his original form IV Certificate and he never appeared again. That the certificate he had submitted was later confirmed to be fake.
30. The Appellants denied terminating the Respondent's employment. The trial court considered the evidence as adduced and made it's findings that the Respondent's termination by the Appellants was unfair as he was not given any hearing before his termination. The issue of the Respondent absconding duty was found not true as there was no evidence that the Appellants sought after him after he left work with no reason and find out the reason for the failure to present himself to work.
31. On the issue of the form four certificate the learned Magistrate found that the matter was never investigated and the matter reported to police.
32. The trial court found for the Respondent and awarded him 123,994.48 being pay for 15 days, 10,156.60 1-month salary in lieu of notice = 16,143.70/=, underpayment 21,197.90 and normal overtime 76,496.28/=.
33. The trial court didn't award any compensation for unfair termination. It is on this basis that an application for review dated 12/5/2023 was made asking the court to consider awarding compensation for unfair termination.
34. The review application was dated 31/5/2023 and it sought a review of the judgment of the court delivered on 12/5/2023. The Hon. Magistrate Hon. Orenge considered the review application and awarded the Respondent compensation of Kshs. 93,724 for unfair termination. The Appellant had argued that since they had filed an appeal, review application should not have been entertained.
35. Having analysed the evidence afresh, I find that indeed the Respondent was employed by the Appellant but due to a theft incident at work, he avers that he was dismissed. The Appellant aver that he absconded duty.
36. The Appellants however have not demonstrated the measures they put in place to try and trace him and subject him to a disciplinary process for absconding duty.
37. As submitted before the lower court, when an employer alleges that an employee has absconded duty, the employer must demonstrate efforts made to reach out to the employee and find out reasons leading to his absence from work.
38. In this case, the Appellants averred that the Respondent absconded after being asked to present his original form 4 certificate.
39. On this issue, the Appellants have not submitted that the reason for the Respondent's dismissal was presentation of fake certificate. The Appellants agreed that they didn't even issue the Respondent with



a dismissal letter. In the circumstances, the issue of a fake form four certificate is not material to the dismissal of the Respondent.

40. Having considered the evidence and submissions as analysed above, I make the same finding that the Respondent's termination was unfair and unjustified. It was therefore proper that he be awarded notice pay, salary for days worked and any underpayments and normal overtime as was awarded.
41. Under section 49 of the *Employment Act* 2007 he was also entitled to payment of compensation which was thereafter granted on review. Order 45 rule (1) of the Civil Procedure Rules 2010 provide as follows:

“Order 45 Review [Order 45, rule 1.] Application for review of decree or order. 1.

- (1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

42. My reading of this section shows that a review can be granted so long as an appeal has not been allowed, as in this case where the review was filed before this appeal was considered. Infact the review application was filed on 31/5/2023 whereas the Memorandum of Appeal was filed 5/6/2023.
43. It is therefore clear that the trial court still had its power for review at the time the application was filed and there was no bar to prevent the review application.,
44. In considering the review however, the trial Magistrate was bound to award compensation as per section 49 of the *Employment Act* 2007 which provides that the compensation will ran between 1 month to 12 months salary. The trial court however gave a blanket amount of 123,994.48/= without stating the number of months the compensation run.
45. I will therefore put in perspective the compensation the Respondent is entitled to and considering that he had worked for the Appellant for barely 6 months. I will award him compensation of 6 months salary for the wrongful termination which translates to $6 \times 13,000 = 78,000/=$
46. The rest of the judgment remains undisturbed. The Appellants will pay costs of this appeal and of the lower court.

JUDGEMENT DELIVERED VIRTUALLY THIS 25TH DAY OF JULY, 2024.



HON. LADY JUSTICE HELLEN WASILWA
JUDGE

In the presence of: -

Mburu S.K for the Respondent – present

Kamonjo Kiburi for Appellant – present

Court Assistant - Fred

