



REPUBLIC OF KENYA



**Khamala v Robinson Security Ltd (Appeal E024 of 2023)  
[2024] KEELRC 2076 (KLR) (6 August 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2076 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
APPEAL E024 OF 2023  
ON MAKAU, J  
AUGUST 6, 2024**

**BETWEEN**

**ELISHER IMBIYOYI KHAMALA ..... APPELLANT**

**AND**

**ROBINSON SECURITY LTD ..... RESPONDENT**

*(Being an appeal against the Judgment and Decree of Hon. M.Okuche, Senior Principal Magistrate delivered on 21st November, 2023 in Nyeri ELRC No.E048 of 2021)*

**JUDGMENT**

**Introduction**

1. The appellant filed suit in the Chief Magistrates court Nyeri alleging that the respondent employed him as a Supervisor stationed at Samrat Supermarket from April 2009 to 31<sup>st</sup> January 2021 when it abruptly terminated his employment. Therefore, he prayed for: -
  - a. Declaration that the termination of his employment was unlawful and unfair.
  - b. Payment of Kshs.1,493,660.00 made up of compensatory damages and terminal dues.
  - c. Certificate of service.
  - d. Costs and interest.
2. The respondent filed a Memorandum of Response denying liability because the claimant was a casual employee hired on need basis (reliever) and when his contract expired on 31<sup>st</sup> January 2021 he left to work for Samrat Supermarket from 1<sup>st</sup> February 2021. Therefore, it prayed for the suit to be dismissed with costs since the claimant was not entitled to the reliefs sought.



### **Before the Lower Court**

3. The suit went to full hearing and both sides tendered evidence. The appellant testified as PW1 and his testimony was that he worked for the respondent for a total of 11 years 8 months continuously. He served diligently and without disciplinary or performance issue until the material day when his services were terminated without prior notice or payment of salary in lieu of notice. He was not given the reasons for the termination and due process of the law was not followed.
4. During cross examination, he confirmed that he joined Sanin Global Supplies Limited immediately he left the respondent. He clarified that he left without notice after the respondent sent him an email terminating his services. He did not produce the email as exhibit.
5. He disowned the signature in the documents filed by the respondent and contended that he never signed any employment contract with the respondent. He only used to sign petty cash voucher to receive payment. For the eleven years he never went for leave. He relied on NHIF and NSSF records/statements as proof that he worked for the respondent continuously.
6. The respondent's Group Human Resource Manager testified as DW1. His testimony was that the appellant was employed by the respondent as a casual worker and on various contracts as per the employment contracts and muster rolls filed as exhibits. The appellant was given annual leave for the periods he worked more than 12 months consecutively as per the leave forms filed as exhibits. The appellant was not victim of unfair termination since he voluntarily left work on 31<sup>st</sup> January 2021 after his contract expired and went to work for Samrat Supermarket (respondent's client) from 1<sup>st</sup> February 2021.
7. On cross-examination, he admitted that the respondent employed the claimant in 2009. His salary was Kshs.20,000.00 which was the same amount he was earning at the time of separation. The claimant signed contracts but did not date them. The second last contract was for 36 months from 1<sup>st</sup> May 2018 and it was scheduled to end on 31<sup>st</sup> May 2021. It was not terminated. The termination was formal. They learned that the appellant was employed by the client and they had no problem with him.
8. He stated that the purposes of the muster roll were to indicate when the claimant was in or out. He admitted that the appellant was an employee and they were making statutory deductions. He was paid according to the varying daily wage. He never worked in the months whose muster rolls were not filed in court as exhibits.
9. After considering the evidence and submissions filed by counsel, the trial court (Hon.Okuche,SPM) rendered himself on 21<sup>st</sup> November 2023 concluding that the appellant was hired under a fixed term contract which expired automatically. He then held that there was no requirement for either party to serve a termination notice and as such the appellant had failed to prove a case of unfair and unlawful termination within the meaning of section 43 and 45 of the *Employment Act*. He further held that the appellant was not entitled to the reliefs sought and dismissed the suit with direction that each bear own costs.

### **The appeal**

10. The appellant was aggrieved and filed a memorandum of Appeal dated 19<sup>th</sup> December 2023 praying that: -
  - a. That the Appeal be allowed in its entirety.



- b. That the Judgment of Honourable M.Okuche , SPM, delivered on 21<sup>st</sup> November, 2023 in Nyeri Chief Magistrate ELRC No.E048 of 2021 , be set aside and/or varied.
  - c. That the Honourable Court grants any other/further reliefs as it may deem necessary.
  - d. That costs of this Appeal be provided for.
11. The appeal raised the following grounds: -
- a. That the learned Trial Magistrate erred in law and fact by applying the wrong principles of law that the Appellant’s employment was a term employment/service based, thus erroneously dismissing the Appellant’s claim in its entirety thereby occasioning a miscarriage of justice.
  - b. That the learned Trial Magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the Appellant’s claim under the heads of unpaid leave days, rest days, severance pay /gratuity and housing allowance, thereby occasioning a miscarriage of justice.
  - c. That the learned Trial Magistrate erred in law and fact by failing to hold and find that the Appellant’s termination was unfair as the Appellant had not voluntarily left employment/ resigned, thereby occasioning a miscarriage of justice.
  - d. That the learned Trial Magistrate failed to address his mind to the pleadings on record and the evidence by the parties, thereby occasioning a miscarriage of justice.
  - e. That the learned Trial Magistrate erred in law and fact in failing to evaluate the entire evidence as well as submissions as presented by the Appellant, thereby occasioning a miscarriage of justice.

**Submission by counsel**

- 12. It was submitted for the appellant that the trial court erred in law and fact by applying the wrong principles of law to find that the appellant’s employment was a fixed term, thus erroneously dismissing the appellant’s claim in its entirety thereby occasioning a miscarriage of justice. The court was urged to analyse the contracts of employment on page 38-71 of the record of Appeal and the NSSF and NHIF Statements on page 18-23 and page 24-28 which shows that the respondent continuously remitted statutory deductions.
- 13. It was submitted that the respondent admitted having employed the appellant as a casual employee and since it continuously remitted statutory deductions for 11 years, then the casual employment of the appellant converted to permanent employment as at the time of separation, by dint of section 37 of the *Employment Act*. Support was gathered from the case of Silas Mutwiri v Haggai Multi-Cargo Handling Services Ltd [2013] eKLR.
- 14. It was further submitted that since the respondent did not have any justifiable reason for terminating the appellant’s employment, after it converted to permanent employment, the appellant is entitled to the reliefs sought in the suit. The court was invited to examine the impugned judgment in page 116-126 of the record of appeal which reveals that the trial court did not analyse the claim for unpaid leave days, rest days, severance pay/gratuity and housing allowance. Consequently, the court was urged to find that the trial court fell into error by dismissing the entire suit without analysing the said claims, and thereby occasioned a miscarriage of justice.
- 15. Finally, it was submitted that the trial court failed to address his mind to the evidence by the parties, and thereby occasioned a miscarriage of justice. It was submitted that, had the trial court properly



analysed the pleadings and the evidence by the parties, he would have noted the contradictions in the respondent's evidence. At one point the respondent stated that the appellant was casual employee on need basis yet it remitted statutory deductions for him consistently. Again, by its response to the demand letter it stated that it had no contract with the appellant but during the trial it produced contracts which did not have appellant's signature and date. In view of the foregoing submissions, the court was urged to allow the appeal as prayed.

16. On the other hand, it was submitted for the respondent that the appeal herein lacks merits and ought to be dismissed with costs because the appellant failed to discharge his burden of proof before the trial court.
17. It was submitted that the trial court was right in holding that the appellant was engaged on a contract term employment, based on availability of work. It was submitted that the appellant did not adduce any evidence to prove that he worked continuously for over 11 years.
18. It was further submitted that the trial court perused agreements and reached the conclusion that the appellant was engaged under a term contract employment. The court was therefore urged not to interfere with the said finding because the appellant was employed as a relieve/casual worker based on the availability of work. The court was urged to note the uncontroverted evidence filed by the respondent being Employment contracts and muster rolls which shows the exact month and years when the appellant worked.
19. It was submitted that the foregoing evidence is proof that the appellant's contract engagement did not convert to permanent and pensionable employment under section 37 of the *Employment Act*. It was argued that the remittance of statutory deductions continuously did not automatically translate the appellant to a permanent employee. It was argued that the remittances were done as an incentive for all its workers and not for the appellants alone.
20. It was submitted that the trial court was right in holding that parties are bound by the terms of their contract and the court cannot re-write for the parties the terms of their contract. It was further submitted that the appellant is bound by the contract produced by the respondent and the allegation that the signature therein is not his cannot stand because he failed to discharge his burden of proof of the said allegation.
21. It was further submitted that the alleged unfair termination was a non-issue because the appellant admitted in evidence that he left employment without giving notice to the respondent and immediately joined Samrat Supermarket as an employee. It was argued that the trial court was right in finding that the appellant did not prove a case of unfair termination and instead found that the contract expired and no party had obligation to serve termination notice to the other. Further that, there was no obligation to renew the expired contract and therefore the reliefs sought are not merited.
22. Finally, it was submitted that the claim for unpaid leave days, rest days and housed allowance are unmerited and are an afterthought. It was submitted that the respondent produced leave forms and muster rolls to prove that the appellant did not work continuously as alleged, and that those periods he worked for 12 months consecutively, he was given leave.
23. It was further submitted that the appellant did not produce any evidence to show that he never went on leave or that there was separate agreement on allowances. It was then submitted that the appellant was duly compensated for the work done as per the terms of the said contracts and therefore his appeal should be dismissed with costs. For emphasis, the court was urged to seek guidance from *Selle & Another v Association Motor Boat Co.Ltd [1968] eKLR* which defined the role of an appellate in a relation to a first appeal.



## Analysis and determination

24. In the said case of *Selle & Another v Associated Motor Boat Co.Ltd* the Court of Appeal held that:-

“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 which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses 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 demeanor of a witness is inconsistent with the evidence in the case generally.”

25. Guided by the above binding judicial precedent, I have perused the record of appeal and the submission made by the two sides. The issues for determination are: -

- a. What was the nature of the employment relationship between the parties herein?
- b. Whether the employment was unfairly and unlawfully terminated.
- c. Whether the reliefs sought are merited.

### Nature of the employment relationship

26. The appellant pleaded and testified that he worked for the respondent from April 2009 to 31<sup>st</sup> January 2021 earning Kshs.20,000.00 as his monthly salary. He was never issued with a written contract for the 11 years and 10 months he served the respondent. He disowned the signatures in the contracts, muster rolls and leave forms produced by the respondent.

27. The respondent pleaded that it employed the appellant as casual worker on various months and attached copies of his employment contracts to prove that the appellant never worked continuously. He applied for employment as a casual worker and received daily wages which was paid at the end of the month. In paragraph 4 of the Memorandum of Response it pleaded that: -

“4. The claimant’s allegation that his termination from employment was unfair and unjustified is false since he was a casual worker as per section 2 of the [Employment Act, 2007](#) (copy attached) which provides that: -

“A casual worker is a person whose terms of engagement provide for his payment at the end of each day...”

28. DW1 adopted his written statement as his evidence. In paragraph 3, 4, 5 and 6, he stated the appellant was employed as a casual worker and on various contracts for an agreed daily wage which was paid at the end of the month. The wage was higher than the minimum wage for a casual worker and whenever he worked consecutively for 12 months, he was given annual leave.

29. In his oral testimony DW1 stated that the appellant was issued with contracts but his employment was not continuous. During cross-examination he confirmed that the appellant’s salary was Kshs.20,000 from 2009 to the time he left and that he had a contract of employment for 36 months running from 1<sup>st</sup> May 2018 and to end on 31<sup>st</sup> May 2021.



30. I have carefully considered the above evidence and found the same to be straight forward. The appellant pleaded and testified that he was employed by the respondent for a monthly salary who pleaded and testified that indeed it hired the appellant as a casual worker. It also produced casual Employment Forms/Agreement to prove the alleged casual employment. The appellant contested the said Agreements and disowned the signatures therein. He stated that by its response to the demand letter, the respondent clearly stated that it had no contract with him.
31. The respondent had the burden of proving that the Agreement was authentic and that the signature belonged to the appellant. It did not discharge that burden. Section 107 and 109 of the Evidence Act codifies the maxim that he who alleges must prove. Accordingly, since it is the respondent who alleged that it had a valid contract signed by the appellant, the burden of proving the validity of the document and the signatures therein laid squarely upon the respondent. To that extent, I find that the trial court erred in law and fact by shifting the burden of proving the documents to the appellant.
32. Having found that the respondent did not prove that the appellant signed the said agreements, I must hold that the said documents are not binding on the appellant. They were conveniently made by the respondent for purposes of defeating the suit. They also do not support the respondent's case that it hired the appellant as a reliever.
33. The documents indicate that the appellant was hired as a casual Shop Attendant at Samrat Supermarket yet the respondent alleged that it was an external company engaged to provide security services to the supermarket. The said documents contradict the pleadings by the respondent and therefore I must agree with the appellant that the trial court did not properly address his mind to the pleadings and the evidence.
34. Had the trial court properly analyzed the pleadings and evidence, he would have noted that the appellant's evidence and pleadings were consistent. The appellant pleaded and testified that he worked continuously from April 2009 to 31<sup>st</sup> January 2021. He pleaded and testified that his salary was Kshs.20,000.00. He further pleaded and proved by NSSF and NHIF statements that the respondent remitted statutory deductions for him every month from April 2009 till the month he exited the company.
35. The respondent admitted the foregoing facts as pleaded and proved by the appellant. Consequently, I find and hold that the appellant was not a casual employee or periodic fixed term contract employee. He was employed under a contract of service for an indefinite period terminable by notice under section 35 (1) (c) of the Employment Act. His employment was also protected from unfair termination by section 45 of the Employment Act.
36. Section 35 (1) (c) provides that: -
- “ 35 (1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be –
- (c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of twenty-eight days next following the giving of the notice in writing.”
37. Section 45 (1) and (2) of the Employment Act, 2007 provides that: -
- “(1) No employer shall terminate the employment of an employee unfairly.



- (2) A termination of employment by an employer is unfair if the employer fails to prove –
- a. That the reason for the termination is valid;
  - b. That the reason for the termination is a fair reason -
    - i. Related to the employee’s conduct, capacity or compatibility, or
    - ii. Based on the operational requirements of the employer; and
  - c. That the employment was terminated in accordance with fair procedure.”

38. In the circumstances, I find and hold that the trial court erred in law and fact, and applied the wrong principles when he concluded that the appellant was engaged under a periodic/fixed term contract.

### **Unfair termination**

39. Section 45 above sets out the protection given to an employee engaged under section 35 (1) (c) of the Act. The appellant’s case is that his employment was terminated by the respondent on 31<sup>st</sup> January 2021 without prior notice, for no reason and without following due process as required by the said section 35 (1) (c) and 45 of the *Employment Act*. However, the respondent rubbished the appellant’s allegations and maintained the contract lapsed by effluxion of time and the appellant failed to request for renewal.

40. I have already made a finding of fact that the appellant was not engaged under a fixed term contract but a contract terminable under section 35 (1) (c) of the *Employment Act*. As such, the respondent was obliged to demonstrate that it had a valid reason for terminating the appellant’s employment and that it followed a fair procedure. In the case of *George Musamali v G4S Security Services Kenya Ltd* [2016] eKLR stated that:

“ 14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers’ human resource manual or as set out in the *Employment Act* or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee’s guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”

41. In the instant case, the respondent did not discharge the burden of proving valid reason and procedural fairness as required by section 45 of the *Employment Act* and therefore the termination of the appellant’s employment was unfair.



## Reliefs

42. In view of the foregoing conclusion, I find that the appellant is entitled to declaration that termination of his employment was unlawful and unfair. He is also entitled to award of one-month salary in lieu of notice by dint of section 35 (1) (c) and 49 (1) of the *Employment Act*. Consequently, I am satisfied that the trial court erred in law and fact by finding, contrary to the evidence, that the appellant had not proved a case of unfair termination and in dismissing the prayer for salary in lieu of notice, on ground that notice was not required as the contract expired automatically.
43. As regards the prayer for compensation for unfair termination, I have considered the evidence by the respondent and the admission by the appellant that he secured another employment from Isanil Global Supply Limited one day after separation with the respondent. In the circumstances, I decline to award him compensation for the unfair termination since he mitigated losses. Section 49 (4) (f) and (g) of the *Employment Act* requires the court to consider whether there are prospects of the employee to secure another comparable or suitable employment with another employer.
44. It is my further holding that, the trial court erred in law and fact by failing to analyse the pleadings and the prayers for leave, rest days, severance pay/gratuity, house allowance and certificate of service. The trial court stated that: -
- “The claimant was bound by the terms of his employment. He is not entitled to the reliefs in his prayer. He can only seek for relief which were refunded in terms of the contract.”
45. The foregoing conclusion was contrary to law and evidence. Section 51 of the *Employment Act* entitles an employee who has worked four weeks consecutively to be issued with a certificate of service upon separation. There is evidence that the appellant worked for more than four weeks continuously. He is therefore entitled to that prayer.
46. In addition, Section 28 entitles an employee to annual leave if he works for 12 months consecutively or on pro rata basis if he has completed at least two months service. There is evidence that the appellant worked for over 11 years continuous service without going for leave. He was entitled to 21 days after every 12 months consecutive service. The leave records produced were contested and I have already made a finding that the respondent did not prove their authenticity. Consequently, the appellant is entitled to the leave earned but not taken for the 11 years 8 months equalling to 140 months x 1.75 leave days per month = 245 leave days. The award for accrued leave is therefore Kshs.20,000 x 245/30=Kshs.163,333.33
47. As regards housing allowance, section 31 of the *Employment Act* requires the employer to provide his employee with reasonable housing and in the alternative pay the employee house allowance in addition to the salary. In this case, the respondent did not provide the appellant with a house but it paid him daily wage that included housing. The appellant did not adduce any evidence in the form of Wage orders or Regulations to prove that Kshs.20,000.00 was an underpayment. Consequently, I find and hold that he is not entitled to the claim for house allowance.
48. The claim for rest days is declined because the appellant did not tender any evidence to prove that for over 11 years he worked without any single day off to rest. At least evidence from another person could have made his allegation more believable.
49. The appellant also never adduced any evidence to prove that he was entitled to gratuity or severance pay. Gratuity is only availed to an employee as a term of contract and as such without any evidence that the parties had agreed to such right, the claim for gratuity must fail. Likewise, severance pay is only a



benefit that is paid when an employee is laid off due to redundancy. In this case, the separation was not through redundancy.

### **Conclusion**

50. I have found that the appellant was not employed as casual or under periodic contracts but under a contract of service for an indefinite term within the meaning of section 35 (1) (c) of the [Employment Act](#). I have further found that appellant had proved on a balance of probability that the respondent terminated his employment contract unfairly within the meaning of section 45 of the [Employment Act](#). Finally, I have found that the appellant is entitled to some of the reliefs sought. Consequently, I allow the appeal, set aside the impugned judgment and substitute therewith the following orders: -
- a. Declaration that the respondent unlawfully and unfairly terminated appellant's employment.
  - b. Respondent to pay the appellant: -
    - i. Salary in lieu of notice.....Kshs.20,000.00
    - ii. Accrued leave.....Kshs.163,333.33  
Kshs.183,333.33
  - c. Cost of the appeal and court below and interest at court rates from the date of this judgment.
  - d. The Award is subject to statutory deductions.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 6TH DAY OF AUGUST, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

