



**Flashcom Security Limited v Malika (Appeal E239 of 2023)
[2024] KEELRC 2182 (KLR) (6 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2182 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E239 OF 2023
NJ ABUODHA, J
SEPTEMBER 6, 2024**

BETWEEN

FLASHCOM SECURITY LIMITED APPELLANT

AND

MOSES MUYERA MALIKA RESPONDENT

(Being an appeal from the judgment and decree of Hon. HOSEA MWANGI NGANGA (PM) issued in Milimani Commercial Courts Court Employment Cause No. E1951 of 2021 between Moses Muyera Malika vs Flashcom Security Limited delivered on 19th October, 2023)

JUDGMENT

1. Through the Memorandum of Appeal dated 17th November, 2023, the Appellant appealed against part of the Judgment of Hon. Hosea Mwangi Nganga (P.M) delivered on 19th October, 2023 in Milimani Chief Magistrates Court Employment Cause No. E1951 of 2021 between Moses Muyera Malika vs Flashcom Security Limited.
2. The Appeal was based on the grounds that:
 - a. The Learned Trial Magistrate erred in law and in fact in awarding the Respondent one-month salary in lieu of notice.
 - b. The Learned Trial Magistrate erred in law and in fact in failing to give due regard to the Appellants pleadings, evidence and submissions placed on record and thereby arrived at an erroneous decision in awarding the claim for underpayment.
 - c. The Learned Trial Magistrate erred in law and in fact in awarding the Respondent his claim for public holidays without the Respondent producing any supporting evidence.



- d. The Learned Trial Magistrate erred in law and in fact in awarding the Respondent maximum compensation all circumstances considered.
3. The Appellant prayed that the appeal be allowed and the Judgment of the trial court of 19th October, 2023 in relation to awards of compensation, salary in lieu of notice, underpayment and public holidays be aside with costs of this appeal being awarded to the Appellant.
4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant filed written submissions dated 5th February, 2024 and on the issue of award of maximum compensation of the sum of Kshs 208,958.88 equivalent to 12 months the Appellant submitted that consideration should be given to the period served by the Respondent. That the Respondent had worked for 15 months with about three months remaining for his contract and taking in to account that the Appellant had paid the Respondent his terminal dues including accrued salary since he was not entitled to leave pay then compensation payable to the Respondent should not exceed three months salary.
6. The Appellant relied on the case of CMC Aviation Limited vs Mohammed Noor (2015) eKLR where the court awarded one month compensation. That the Respondent did not prove that he experienced difficulty in securing alternate employment for himself to be awarded maximum compensation or prove the extent of the damage caused by his dismissal. The Appellant prayed that the award of 12 months compensation be substituted with 3 months compensation.
7. On the issue of underpayments in the sum of Kshs 129,198.63 the Appellant submitted that the trial court failed to evaluate the terms and conditions of service with respect to the instrument of engagement which were contracts of employment. That the validity of the contracts of employment were undisputed by the Respondent at trial. The Appellant prayed that this court reexamines their supporting evidence and set aside the award of underpayments.
8. On the issue of Public Holidays in the sum of Kshs 24,702.70 the Appellant submitted that the Respondent did not lead any evidence at trial to support his claim for remedies sought under this head. The Appellant relied on the case of BWK V EK & Another (2017) eKlr in support of this issue.
9. The Appellant further submitted that the Respondent in his submissions at trial court claimed 15 Public holidays but the trial court erroneously awarded him 17 days albeit without any documentary evidence in support of the Claim. That the Respondent never raised the issue of public holiday compensation during his employment but brought it up in the claim hence an afterthought. That the trial court erred by awarding the public holidays because of its failure to provide employment records. The Appellant relied on the case of Jacob Osoro *Manyinsa v Lavington Security Limited (Civil Appeal 55 of 2019)* (2023) KECA 1376(KLR) on the standard of proof. That court should set aside the award of public holiday compensation for lack of proof.

Respondent's Submissions

10. The Respondent filed his submissions dated 25th April, 2024 and on the issue of his maximum compensation he relied on section 49(1)(c) and 4 of the *Employment Act* and submitted that the aspects of section 49(4) were considered by the trial court. The Respondent relied on the case of *Gas Kenya Limited v Odbiambo (Appeal E506 of 2022)* KEELRC 3930(KLR) 22 September 2022) (Judgment) on justifications of 12 months compensation by trial court. That the award of 12 months salary as compensation was justified and should not be interfered with.



11. On the issue of underpayments to the sum of Kshs 129,198.03 the Respondent submitted that he was employed by the Appellant on 22/2/2020 as a night security guard on a monthly salary of Kshs 8,800 where he worked for 15 months. That he was never paid house allowance and or accommodation by the Respondent. That his gross salary as per the Regulation of Wages (General) Amendment Order 2018 in Nairobi was supposed to be paid Kshs. 17,413.24.
12. It was the Respondent's submissions that the salary of Kshs 8,800/= was based on the contract of employment which contract was subservient to the express provisions of the law. That the award of Kshs 129,198.63 should not be disturbed.
13. On the issue of Public Holidays in the sum of Kshs 24,702.70 the Respondent submitted that the court was right in awarding him the award under this head. That in his claim he stated that he worked on public holidays as well as in his testimony in court he proved the same. He relied on the case of *Bwire v Wasso Security Limited (Cause 335 of 2017)* 2024 KEELRC 714(KLR) where court awarded such a claim where there were no employment records.
14. It was the Respondent's submissions that he was terminated on 31.5.2021 and only signed prepared clearance forms and were not in any way discharge vouchers. That the payment of salary of May 2021 was contingent on his signing of clearance form. That there was an element of coercion and undue influence. That the signing of clearance form did not discharge the Appellant from the legal burden of paying him his full and lawful terminal dues. That the Appeal was therefore not merited and should be dismissed.

Analysis & determination

15. This court has considered the pleadings by both parties and the submissions by the parties and this being a first Appeal the court will proceed to reanalyze the evidence before it as was held in the case of *Selle vs Associated Motor Boat Company Limited [1968] E.A 123* thus:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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 witnesses and should make due allowance in this respect. In particular, this 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.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

16. In this case, the Judgment of the trial court was that:
 - a. A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was unfair and unlawful.
 - b. The Claimant is awarded terminal dues in the sum of Kshs 371,660.21
 - c. Costs and interests at court rates from the date of judgment.
17. From the pleadings and proceedings herein, this court notes that the Appellant did not have an issue with the finding of the unfairness of the Respondent's employment but had an issue with the awards the Respondent was awarded by the trial court. This court has come up with one main issue That is whether this court should interfere with the trial court's discretion on statutory awards as well as compensation for unfair termination.



18. This court as an appellate court can only interfere with the discretion of the lower Court to make an award if there was in the exercise of such discretion leading to erroneous decision as was held on the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR where the court held;

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

19. This court will therefore disturb the awards herein if it is proved that the trial court misdirected itself in some matter hence arriving at a wrong decision. This court notes that the parties never submitted on one-month salary in lieu of notice although it was one of the grounds of Appeal. This court takes it as an admission that the Respondent was entitled to the same upon the unfair termination. Upon finding that the Respondent was unfairly terminated without notice or payment in lieu of notice the Respondent was entitled to the same under Section 36 of the Employment Act.

20. On the award of 12 month's salary as compensation, the court notes that this award though discretionary, the court should be guided by considerations set out under Section 49(4) of the Employment Act in awarding the damages herein. The Appellant was aggrieved by the lower court discretion to award the Respondent maximum compensation yet he had worked for only 15 months; he was on a contract which had a remainder of three months hence proposed a maximum of three months. The Appellant also alleged that the Respondent had been paid his accrued salary of May,2021.

21. The trial court while awarding the maximum compensation gave the reason that the Appellant did not prove that the Respondent was the author of his own misfortune in that he orchestrated the strike. The court takes into consideration the 15 Months period the Respondent worked with the Appellant and the fact that his contract had only three months to end. This court also notes that in as much as the Respondent was unfairly terminated the trial magistrate ought to take in to account the considerations outlined under section 49(4) of the Employment Act. In this case in any event after three months the employer-employee relationship was to come to an end unless renewed.

22. The Court of Appeal in Kenya Broad casting Corporation v Geoffrey Wakio(2019) eKLR held that;

(22) This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In Ol Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.

23. In this case the trial court ought to have explained that apart from the Respondent being unfairly terminated, why he was entitled to the maximum compensation. This court takes note of the fact that the Respondent was unfairly terminated but also considers the period of 15 months the Respondent had worked with the Appellant that his contract had three months to come to an end and that he could get employment elsewhere and agrees with the Appellant that three months compensation as damages for unfair termination would be justified.

24. On the issue of underpayment of 129,198.63, the Appellant faults the trial court for making this award stating that the trial court did not evaluate the terms and conditions of service. On the other hand the Respondent alleges that even though the contract of employment provided for Kshs 8,800/= as his salary it was against the express law which was Regulation of Wages (General) (Amendment) Order



2018. The trial court relied on section 48 of the Labour Institutions Act which states that Wages Order constitutes minimum terms which may not be varied by any agreement.

25. This court agrees with the trial court on this head and upholds the trial court finding that the Respondent was entitled to the said underpayments since the Minimum wage provided for Kshs 17,413.24 yet he was earning Kshs 8,800/=

c. Public Holidays in the sum of Kshs 24,702.70

26. Under this head the trial court noted that it was the duty of the Appellant to produce employment records under section 74 of the Employment Act to prove that the Respondent worked on public holidays. That shift checklist only indicated the off days and leave days taken but did not capture the specific public holidays and did not address whether the Claimant was in fact allowed to take public holidays or in the alternative received compensation for working on the said days.

27. The Appellant on the other hand alleged that the Respondent did not lead evidence to support his claim under this head. That the Respondent never complained working on public holidays. That the Respondent in his submission claimed this award for 15 days but the court awarded 17 days. This court notes that the Respondent in his claim claimed 17 days yet in his submissions he claimed 15 days. Even in this court's submissions he has claimed 15 days not 17 days. This court notes that parties are bound by their pleadings and submissions do not take place of pleadings. In this particular case the Respondent has maintained the 15 days and not 17 claimed in the claim. The trial court ought to have awarded the 15 days public holidays in this case since the Appellant did not lead any evidence to refute the Respondent's claims under this head.

28. In the upshot the Appeal partially succeeds as follows; _

a. 3 months' salary as compensation for unfair termination Kshs. 52,239.72/=

b. One month salary in lieu of Notice Kshs..... 17,413.24

c. UnderpaymentsKshs 129,198.63

d. Public Holidays (15 days) Kshs 8,706.62

Total Kshs 207,558.21

29. The appeal partially succeeds hence each party shall bear their own costs of this Appeal.

30. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF SEPTEMBER, 2024.

DELIVERED VIRTUALLY THIS 6TH DAY OF SEPTEMBER, 2024.

ABUODHA NELSON JORUM

JUDGE

