



Kenwatch Security Services Ltd v Mwangi (Employment and Labour Relations Appeal E022 of 2023) [2024] KEELRC 2199 (KLR) (12 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2199 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E022 OF 2023
ON MAKAU, J
SEPTEMBER 12, 2024**

BETWEEN

KENWATCH SECURITY SERVICES LTD APPELLANT

AND

JOHN KAMIRI MWANGI RESPONDENT

((Being an appeal against the Judgment and Decree of Hon. Mary Gituma, Senior Resident Magistrate delivered on 22nd November, 2023 in Nyeri MCELRC No.E074 of 2022))

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 4th December 2023, the appellant challenges the said lower court's decision on the following grounds: -
 - a. The learned Trial Magistrate erred in law and fact by failing to notice that a party is bound by their pleadings and was not pleaded in the claim, Mr.Kingori (Respondent Supervisor) effected termination of employment;
 - b. That the learned Trial Magistrate erred in law and fact by failing to find and hold that the suit before her was not proven in law and in failing to dismiss that suit for bad pleadings;
 - c. That the learned Trial Magistrate erred both in law and fact by failing to find and hold that the evidence which the respondent led in an attempt at proving his claim was at variance with his pleadings and failed to find that the respondent did not prove his claim in that suit.
 - d. That the learned Trial Magistrate erred in law and fact in failing to consider the written submissions of the appellants on record and the authorities annexed therein in support of the appellant's case while arriving at the award in damages.



- e. That the judgment of the learned trial magistrate is against the law and weight of the evidence on record and against the doctrine of stare decisis.
 - f. The trial court erred in failing to evaluate and consider the Respondent (Appellant) witness evidence that, “I tried to reach him through the number given above. He told me he had gotten another job”.
 - g. The trial court erred in finding that the appellant had to subject the respondent upon the procedure of a notice and a hearing as envisaged in section 41 of the *Employment Act, 2007* whereas the contract had long been terminated on 01.6.2022 by the claimant’s resignation by his conduct of absenteeism/absconding.
 - h. The trial court erred in finding that the claimant had worked for the Respondent for about nine months and Awarding the claimant salaries for October 2021, November 2021 and December 2021 without proper evidence and pleading.
 - i. The trial court erred in finding that even if the claimant had absconded from work, he ought to have been given a notice and a hearing when he purported to resume duty.
 - j. The trial court erred in finding that the respondent was unfairly and unlawfully terminated from employment by the appellant and making an award of one-month’s salary in lieu of notice and 6 months’ salary compensation.
 - k. The trial court erred and contravened the General Wages Order in Awarding the claimant nine months Housing Allowance and Leave Allowance.
 - l. The trial court erred in arriving at contradictory findings on absconding from work by the claimant and while on the other faulting the appellant for failing to make reasonable attempts to contact the respondent once he had absconded his duties and thus ultimately arriving at a wrong conclusion that the claimant was unfairly terminated from employment by the appellant.
2. The appellant seeks the following reliefs: -
- a. The appeal be allowed.
 - b. That part of the Judgment delivered on 22.11.2023 making an award for unpaid salary for the month of October 2021, November 2021, December 2021, one month’s salary in lieu of notice, and six months’ salary for compensation for unfair termination and decree herein be set aside in their entirety and substituted with an order for dismissal of those three awards with costs to the appellant.
 - c. That part of the judgment delivered on 22.11.2023 contravening the General Wages Order in Awarding the claimant nine months Housing Allowance and Leave Allowance be corrected.
 - d. Such further or other orders as this Honouable court may deem just and expedient.
 - e. Costs of the appeal be borne by the respondent.

Factual background

3. The respondent was employed by the appellant as a security guard from September 2021 until 2nd June 2022 when they separated. Subsequently, the respondent filed suit in the lower court alleging that his employment had been unfairly terminated by the appellant on 2nd June 2022 and his terminal dues



were withheld. Therefore, he sought compensation for unfair termination plus accrued employment benefits totalling to Kshs.178,000. He further prayed for certificate of service, costs and interest.

4. The appellant denied liability for unfair termination and averred that the respondent failed to report to his new work station on 2nd June 2022 after a lawful transfer from Nebo Hospital to Mpeta. The reason for the transfer was because the client had rejected him. The appellant denied that it terminated the respondent's employment and maintained that the claimant absconded work after the said transfer and failed to handover his uniform.
5. The appellant further denied the reliefs sought by the respondent and maintained that it paid him all his salary according to the General Wage Order of 2018. It further averred that the NSSF and NHIF deductions were duly remitted as required by the law.
6. The appellant counterclaimed against the claimant Kshs.2,280 being the value of the uniform that he failed to handover after leaving employment. Therefore, it prayed for the suit to be dismissed with costs.
7. Each side called one witnesses who adopted their written statements as evidence in chief and produced bundle of documents as exhibits. The claimant contended that he was dismissed in May 2022 by his supervisor Mr.Kingori via phone call and informed Mr.Joseph Koech. He contended that his salary was Kshs.8,000.00 per month and that he was not given notice prior to the termination. He was not paid salary for September, October, November and December 2021 plus January 2022.
8. Mr.Joseph Kingori (DW1) stated that he transferred the respondent to Mpeta Guest House with effect from 2nd June 2022 after a client complained about reporting to work late. The respondent refused to report to his new work station. He called the claimant but he said that he had secured another job. He was then paid his salary for May 2022 through Mpesa. Subsequently, he complained that he had not received his salary for January and May 2022.
9. DW1 contended that he had no authority to fire any employee but only to hire. The power to fire was bestowed upon Mr.Kenya, Manager Mr.Joseph Koech or the HR Manager. He contended that the respondent signed for the uniform given including shirt, trouser, sweater and raincoat but the document he signed was not produced in court. He maintained that the respondent failed to return the uniform even after being verbally warned.
10. After the hearing, both sides filed submissions and the trial court (Hon.Gituma, SRM) rendered the impugned judgment in favour of the respondent whereby she found that a case of unlawful termination had been proved and awarded him six month's salary as compensation for unlawful termination, salary in lieu of notice, salary for October-December 2021, refund of NHIF and NSSF deductions, prorate leave and house allowance totalling to Kshs.100,400.00. Further, a certificate of service was awarded plus costs and interest.

Submissions in this appeal

11. It was submitted that the respondent did not plead that he was dismissed by Mr.Kingori but during his evidence he stated that he was dismissed by Mr.Kingori, his supervisor in May 2022. Consequently, the trial court allowed the respondent to violate the principles of pleadings.
12. It was further submitted that the respondent prayed for unpaid salary for September-December 2021 plus January 2022 equalling to Kshs.48,000 yet in his statement of claim he pleaded that he was not paid salary for January and May 2022. Consequently, it was urged that the court awarded salary for October-December 2021 based on contradictory evidence. It was contended that the written statement and the oral testimony by the respondent were inconsistent.



13. It was further submitted that the award of six months' salary compensation (Kshs.48,000) was made without considering the fact that the respondent had only served for nine (9) months before separation. Further, that the court failed to consider the Judicial precedents cited and the evidence adduced by the parties. Also, the court did not consider section 49 (4) (b) and (k) of the [Employment Act](#) which deals with the circumstances under which the termination including the extent to which the employee caused or contributed to the termination.
14. Reliance was placed on the case of [Xforce Security Solution \(KE\) Ltd v Samuel Tsimba Ndonga](#) (not availed to court) where the court held that desertion of duty amounts to resignation by conduct of the employee's absence without leave or lawful cause. Consequently, in the present case the appellant prayed for the appeal to be allowed with costs.
15. On the other hand, it was submitted for the respondent that he led evidence based on the pleadings and produced supporting documents. It was argued that the trial court properly evaluated the evidence and arrived at correct finding that the appellant had terminated his employment without following procedure laid down by Section 41 of the [Employment Act](#), 2007 since no reason was given and notice or hearing accorded to him.
16. It was submitted that, Mr.Kingori terminated the respondent's employment in May 2022 and therefore there is no way he could report to work the following month. Further, it was submitted that the appellant did not produce any documents to prove that he was paid all salary as alleged. It was argued that section 74 of the [Employment Act](#) requires an employer to keep employees records but in this case such records were not produced in this case to prove payment of salary and remittances of statutory deductions.
17. It was submitted that the court was right in finding that the respondents' employment was unlawfully terminated contrary to section 41, 43, 44 and 45 of the [Employment Act](#),2007 and that the claimant was entitled to the reliefs awarded. Reliance was placed on [Anthony Mkala Chitavi v Malindi Water & Sewerage Co.Ltd](#) (not availed) and the court was urged to dismiss the appeal with costs.

Determination

18. This being a first appeal, my mandate is to re-evaluate the evidence on record and make my own independent conclusions. I am guided by the decision of Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 where the court held thus: -

“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.”

19. Having perused through the record of appeal carefully, the following issues fall for determination: -
 - a. Whether the respondent was dismissed by the appellant or he absconded duty.
 - b. If the answer in (a) above is dismissal, whether the same was unlawful and unfair.



- c. Whether reliefs sought was merited.

Dismissal or absconding

20. Section 107 of the *Evidence Act* provides that he who seeks court's judgment on a matter he must adduce evidence to prove his allegations. The respondent alleged that his employment was terminated by his supervisor, Mr.Kingori in May 2022. He contended that he called the supervisor over the phone and in response he dismissed him for no reason and without prior notice.
21. The appellant, on the other hand contended that the respondent was rejected in his work station at Nebo Hospital and he was transferred to Mpeta Guest House. However, he failed to report to work on 2nd June 2022 and when he reached him over the phone, he responded that he had secured another job.
22. Having considered the evidence on record, I have noted that the respondent did not indicate the date when he called the supervisor and received the termination of his employment. He also did not state the reason why he called the supervisor and he did not state the date he called Mr.Koech about the dismissal by Mr.Kingori. Consequently, I find that the respondent did not adduce sufficient evidence to prove, on a balance of probability, that he was dismissed from employment by his supervisor Mr.Kingori.
23. If that was true, he would have pleaded the date of the dismissal and the person who dismissed him and then support by evidence. Without such pleading and evidence, I must hold that the respondent was not dismissed from his employment by the appellant.
24. There is however, evidence to show that the respondent absconded work. The appellant has produced Dispatch No.299 dated 1st June 2022 indicating that the respondent was transferred from Nebo Hospital to Mpeta. The Dispatch was signed by DW1 (Mr.Kingori). There is also a Transfer Form dated 30th May 2022 transferring the respondent from Nebo Hospital to Mpeta effective from 1st June 2022. The respondent did not challenge the authenticity of the said documents. Consequently, I reiterate that the respondent refused transfer and absconded work. He is therefore to blame for the termination of his employment and as such the claim for unlawful termination is a non-starter.

Reliefs

25. In view of the foregoing finding, I find that the respondent is not entitled to declaration that his employment was unfairly terminated. He is also not entitled to compensation for unfair termination or salary in lieu of notice under section 49 of the *Employment Act*, 2007. To that extent, I find that the trial court erred in law and fact in finding that the respondent's employment was unfairly terminated by the appellant.
26. As regards the prayer for annual leave, there is no dispute that the respondent worked for nine (9) months and he earned leave at the rate of 1.75 leave days per month. Hence $1.75 \times 9 = 15.75$ leave days. Based on salary of Kshs.8000 $\times 15.5/30 =$ Kshs.4,200.00. Accordingly, I agree with the trial court on the same.
27. The claim for unpaid salary was for September 2021 – January 2022 equalling to five (5) months. The appellant filed payrolls for September 2021, and January 2022 but failed to produce pay roll for the other months. Therefore, the respondent is entitled to salary for October - December 2021 being $\text{Kshs.}8000 \times 3 = \text{Kshs.}24,000$. On this amount, I agree with the trial court.
28. The respondent also accused the appellant of not remitting NSSF and NHIF contribution amounting to Kshs.1800 and Kshs.3600 respectively. However, he did not prove by evidence that the said money was deducted from his salary by the employer. I say so because the pay rolls produced did not indicate



any statutory deductions and the bank statement produced by the respondent indicates that Kshs.8000 or other lesser amounts earned were credited in his account. The payment was paid without any deductions. Consequently, the award of the said sum by the trial court was not based on evidence and it is set aside.

29. As regards the claim for house allowance, there is no evidence that the respondent was provided with housing by the appellant. Consequently, the appellant was required under section 31 of the *Employment Act* to pay the respondent house allowance. The courts have adopted a rate of 15% of the basic pay as reasonable house allowance. Hence $Kshs.8000 \times 15/100 \times 9 \text{ months} = Kshs.10,800$. On that, I find that the trial court did not err in making that award.

Conclusion

30. I have found that the respondent did not prove on a balance of probability, that his employment was terminated by the appellant but rather he absconded work as such is not entitled to compensatory damages under section 49 of the *Employment Act*, 2007. I have also found that he has not proved the claim for unremitted NSSF and NHIF contributions. He is however entitled to unpaid salary for October – December 2021, 15.75 leave days, and house allowance for nine months. Consequently, I allow the appeal as highlighted and vary the impugned judgment in terms of the following orders: -

- a. Unpaid salary.....Kshs.24,000.00
- b. Leave.....Kshs. 4,200.00
- c. House Allowance.....Kshs.10,800.00
Kshs.39,100.00
- d. The award is subject to statutory deductions.
- e. The award of costs and interest awarded by the trial court remain unchanged.
- f. Since the appeal has partially succeeded, each party shall bear own costs of the Appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF SEPTEMBER, 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

