



**Hatari Security Guards Limited v Mutungi (Appeal E042 of 2024)
[2024] KEELRC 2469 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2469 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E042 OF 2024
M MBARÚ, J
OCTOBER 11, 2024**

BETWEEN

HATARI SECURITY GUARDS LIMITED APPELLANT

AND

PHOEBE KAVUTHA MUTUNGI RESPONDENT

*(Being an appeal from the judgment of Hon. Mbeja delivered
on 29 February 2024 in Mombasa MCELRC E011 of 2020)*

JUDGMENT

1. The appeal arises from the judgment delivered on 29 February 2024 in Mombasa MCELRC No.E011 of 2020. The appellant is seeking the judgment be set aside and substituted with a dismissal of the claim with costs.
2. The background of the appeal is a claim filed by the respondent on the basis that on 25 July 2011, she was employed by the appellant as a day security guard and deployed in Mombasa. Her workstation was Mombasa NSSF offices. During the parade held on 31st July 2020 at 6 am, the respondent was informed together with other colleagues that the appellant’s contract for guarding the NSSF building would lapse at midnight and this would be their last day at work. She was asked to report at the appellant’s office in the Mkomani area on 1st August 2020 where she was verbally informed that her employment had been terminated with immediate effect. There was no prior notice, hearing or notice indicating there would be summary termination of employment. During the employment, there was underpayment, no housing or allowance paid, overtime work and during all public holidays, the respondent remained at work without compensation. She claimed the following terminal dues;
 - a. Notice pay Ksh.15,608;
 - b. House allowance for 7 years Ksh.109,261.50; Service pay for 7 years Ksh.36,020;



- c. Uniform allowance for 9 years Ksh.10,800;
 - d. Underpayments for 7 years Ksh.421,345.20;
 - e. Unpaid overtime for 7 years Ksh.977,568.60;
 - f. 12 months compensation Ksh.187,305.60;
 - g. Costs of the suit.
3. In response, the respondent denied there was employment from 25 July 2011 as alleged. Employment was from 1st August 2011 and she was seconded to work for Rift Valley Railway Limited per the letter of appointment. At the time, Rift Valley Railways Limited was pursuing concession from Kenya Railway Corporation Limited. Before finalization, the appellant was forced to take a loan to finance wages but the concession never concluded. The agreement was cancelled crippling its operations but the respondent was deployed at the NSSF building with other employees. There was no termination of employment as alleged. Upon the lapse of the contract with NSSF, the appellant informed all employees that there were arrangements to attend security training at the appellant's Training School in Nairobi pending redeployment. The respondent opted to abscond duty without notice or good cause and the desertion was reported to the Labour office on 1st September 2020.
4. The appellant also replied to the claim that it was part of its policy to pay wages under the Wage Orders and to fill overtime sheets for over hours for approval. There was no application for annual leave to allow the appellant's approval. Each employee is entitled to 21 leave days per year granted upon application by the employee. All untaken leave days are lost after 18 months. The respondent did not register with NSSF to allow the appellant to effect deductions. Upon termination of employment, the respondent was paid Ksh.10, 800 for uniform and notice pay is not due following desertion of duty.
5. The trial court allowed the claim in its entirety with costs and interests.
6. Aggrieved, the appellant filed the appeal on 10 grounds that the learned magistrate erred in failing to make a finding that the respondent deserted duty and making the following awards;
- a. Salary in lieu of notice Ksh.15,608.80;
 - b. Leave allowance Ksh.109,261.50;
 - c. Underpayment Ksh.421,345.20;
 - d. Overtime Ksh.977,568.20;
 - e. Service pay Ksh.36,020.50;
 - f. Uniform allowance Ksh.10,800;
 - g. 12 months compensation ksh.187,305.60
7. The trial court failed to apply the correct provisions of the law and principles in making these awards.
8. Both parties attended and agreed to address the appeal by way of written submissions.
Only the appellant complied.
9. The appellant submitted that employment was from 1st August 2011 and not 25 July 2011 as alleged. The respondent worked until 1st August 2020 when she absconded duty without notice which matter was reported to the Labour officer.



10. During her employment, the respondent was paid a minimum wage with the benefits. She worked 8 hours each day with a rest day including public holidays and house allowance. On 1st August 2020, all employees were issued with transfer letters but the respondent opted to abscond duty. The appellant called witnesses to confirm the fact of the transfers.
11. The appellant submitted that there was no overtime work and each employee had a set schedule including a rest day. All employees had their NSSF dues remitted. Employment terminated due to absconding of duty and after the respondent was transferred from the NSSF building. The appellant tried reaching out to the respondent without success prompting notice to the Labour officer. In the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR the court held that where the employee absconds duty, such is a valid reason leading to termination of employment. The award of notice and compensation are not justified.
12. Annual leave is a right under Section 28 of the *Employment Act*. Each employee was allowed 21 days upon application and approval. The respondent did not file an application and the claims for accrued leave days for 7 years are time-barred contrary to Section 90 of the *Employment Act*. In Mary Kitsao Ngowa & 36 others v Krystalline Limited [2015] eKLR the court held that unpaid leave that go beyond 3 years is time-barred and cannot be claimed based on Section 90 of the *Employment Act*.
13. This position is reiterated in the case of Edward Ochieng v Dan Okumu [2022] eKLR and Monica Wanza Mbavu v Roofspec & Allied Works Co. Ltd [2021] eKLR.
14. On the claim for underpayments, the claims from 2011 to 2017 are time-barred and these are made contrary to Section 90 of the *Employment Act* as held in Mary Kitsao Ngowa & 36 others v Krystalline Limited [2015] eKLR. The respondent was employed as a day guard on a wage of Ksh.10, 580 per month from 1st May 2018. Under the Wage Orders, a day security guard had a wage of Ksh.13, 572.90 but the respondent has applied a wage of Ksh.15, 608 for a night guard and the trial court applied the wrong principles in making its award.
15. On the claim for overtime, the claim is exaggerated based on facts that there was overtime worked for 7 years at 12 hours each day. This is not humanly possible.
16. On the claim for service pay the claims made go beyond 3 years and should be dismissed. Uniform allowance was paid and the entire claim and judgment should be dismissed.
17. At the close of pleadings, there were no written submissions filed by the respondent.

Determination

18. This is a first appeal. The court is required to review the entire record, re-assess the findings, analyze it and make a conclusion. Regard must be given to the fact that the trial court had the opportunity to hear the parties in evidence.
19. The respondent's case before the trial court was that on 1st August 2020, she was directed to report at the offices of the appellant at Mkomani in Mombasa from her site at the NSSF building. She did as directed but her employment was verbally terminated without notice or payment of terminal dues.
20. The appellant called evidence that the respondent was transferred after the contract at the NSSF building ended. Instead, she absconded duty and despite all efforts to trace her, this was not successful. A report was made to the Labour office on the absence of the respondent.



21. The respondent did not contest the letter and notice dated 1st August 2020, the transfer letter from the NSSF building to the training school in Nairobi. She was to report latest 10 August 2020 awaiting redeployment.
22. The respondent testified at length about the ongoing NSSF building assignment. The contract with the client ended. She was required to report back to the office. The verbal termination of employment is not addressed.
23. The law places the burden of proof on an employee to provide prima facie evidence in terms of section 47(5) of the *Employment Act* to prove unfair termination of employment before the presumption aforesaid comes into play. On the other hand, section 43 of the Act obligates the employer to prove the grounds for terminating employment. Where the employer fails to do so, the law raises a presumption in favour of the unlawfulness of the termination of employment. However, where the employee fails to discharge her burden, the employer's duty is discharged.
24. On the records submitted particularly the report to the Labour officer, the appellant well complied with the provisions of Sections 35 and 18(4) of the *Employment Act*. The failure by the respondent to follow through with the alleged verbal notice terminating her employment, employment terminated by desertion of duty. She frustrated her employment by abandoning her employment with the appellant.
Notice pay and compensation awards are not justified.
25. On the claim for leave allowance, save for submitting the leave application form, the appellant has not addressed how they allocated the respondent her right to annual leave per Section 28 of the *Employment Act*. The employer has the duty to direct an employee to take annual leave. The employee who is not allowed to take her annual leave each year can file an application; if not approved, such can be used to claim accrued leave days. However, annual leave is not accrued beyond 18 months.
26. In this case, the respondent did not discharge her burden save to urge a claim for 7 years of accrued leave days. This only goes for 18 months which is 33 days based on the basic wage of Ksh.13, 572.90 for a day guard working in Mombasa in the year 2020. The total due is Ksh.14, 929.20 in leave pay.
27. Underpayments of wages are particularized by the respondent in her Memorandum of Claim. However, the rates applied, the appellant has not filed any schedule of the wages paid or the payment statements issued to the respondent as required under Sections 19 and 20 of the *Employment Act*.
28. From 1st August 2011, the wage due is Ksh.5, 195 plus 15% house allowance Ksh.779 gross Ksh.5, 974.25 while the respondent was earning Ksh.5, 600. The underpayment per month is 374.25 and for 9 months the underpayment is Ksh.3, 368.25.
29. From 1st May 2012, the wage due is Ksh.8, 579.80 plus 15% house allowance being Ksh.1, 286.97 gross Ksh.9, 866.77 per month. The wage paid is Ksh.5, 600 the underpayment is Ksh. 4, 266.77 for 12 months underpayment is Ksh.51, 201.24.
30. From 1st May 2013 wage was Ksh.9, 780.95 plus 15% house allowance being Ksh.1, 467 gross Ksh.11, 247.20 and the respondent was earning Ksh.7, 200 the underpayment is Ksh.4, 048 and for 8 months the underpayment is 32,377.
31. From 1st May 2013 wage was Ksh.9, 780.95 plus 15% house allowance being Ksh.1, 467 gross Ksh.11, 247.20 and the respondent was earning Ksh.8, 000 and underpayment is 3,247 and underpayment of Ksh.38, 000.



32. From 2015 wage of Ksh.10, 954.70 plus a house allowance of Ksh.1, 543 gross Ksh.12, 597 and the respondent was earning Ksh.8, 800. The underpayment is Ksh.3, 797 for 12 months Ksh.45, 564.
33. The 2016 wage was Ksh.10, 954.70 plus house allowance of Ksh.1, 543 gross Ksh.12, 597 and the respondent was earning Ksh.10, 000. The underpayment is Ksh.2, 597 and for 12 months, the underpayment is Ksh.31, 164.
34. The 2017 wage was Ksh.12, 926.55 plus a house allowance of Ksh.1, 938.90 gross Ksh.14, 864.90 and the respondent was earning Ksh.10, 580. The underpayment is Ksh.4, 284.90 the underpayment for 12 months is Ksh.51, 418.80
35. The 2018 wage was Ksh.13, 572.90 plus the house allowance is Ksh.2, 036 gross Ksh.15, 608. The wage paid is Ksh.10, 850 underpayment of Ksh.4, 758 for 25 months is Ksh.118, 948.

Total underpayments Ksh.372, 042.

36. The claim for overtime is on the basis that the respondent worked for 12 hours each day which spread to all Sundays and public holidays without a rest day.
37. The example of the year 2011 is that from July 2011 to April 2012, the claim is that the respondent worked for 8 hours overtime per week, had 12 hours for 2 rest days per week and had 6 public holidays for the years.
38. Under Section 27 of the *Employment Act*, each employee is entitled to one (1) rest day each week. The claim for 2 rest days is not justified. cumulatively, these claims are an exaggeration.
39. Public holidays are appreciated as forming part of special days at work. These should be compensated. However, public holidays are not general and are published by the Minister. Where at work, the employee should identify which public holiday was gazette and contradistinguish such a day with a rest day. A general claim cannot suffice.
40. It is not humanly possible to be at work for 12 hours over 365 days. This has to give way to over-exaggeration. The respondent failed to take into account the various applications she requested for time off and was allowed;

Application dated 18 January 2013;

Application dated 18 March 2015;

Application dated 28 May 2017;

Application dated 18 October 2018;

Application dated 21 January 2019;

Application dated 19 February 2019;

Application dated 3rd November 2019; and

Application dated 29 November 2019.

The claims for overtime are overstated without justification.

41. On the claim for service pay, under Section 35(5) and (6) of the *Employment Act*, the employer must have the employee register with NSSF and NHIF or establish a medical cover of social security protection under the agreement. The appellant's case that the respondent refused to get registered is not a good defense. The employer must ensure each employee is registered before employment. The evidence by the witnesses called by the appellant that they were all registered with NSSF would have



- been easily addressed by issuing the employee with payment statements with an outline of how their wages were tabulated including statutory deduction. This record should have been submitted by the appellant as the employer under the provisions of Section 10(6) and (7) of the Employment Act.
42. Without any record of statutory payments, service pay is due based on the last wage due of Ksh.15, 608 at 15 days' pay for each full year worked. From August 2011 to July 2020, the respondent worked for 9 full years. Service pay is claimed at 4 years at Ksh.36, 020.50.
43. On the claim for a uniform refund of Ksh.10, 800, there is no evidence submitted on this payment.
44. On costs, these do not follow the cause. Under Section 12(4) of the Employment and Labour Relations Act, the court must give reasons and justification for the award of costs. In this case, the appeal is partially successful save the claims made are reviewed. The costs awarded by the trial court will suffice save interests are not due. For this appeal, each party bears its costs.
45. Accordingly, the judgment in Mombasa MCELRC E011 of 2020 is set aside and substituted with the following awards;
- a. Accrued leave days Ksh. 14,929.20;
 - b. Underpayments Ksh.372, 042.
 - c. Service pay Ksh.36,020.50;
 - d. Uniform allowance Ksh.10,800;
 - e. For the appeal, each party bears its costs. Costs for the trial court proceedings as awarded without interest.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 11 DAY OF OCTOBER 2024.

M. MBARŪ

JUDGE

