



**Emungor v Winstar Security Guards Ltd (Cause E144 of 2021)
[2024] KEMC 59 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEMC 59 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CAUSE E144 OF 2021
PA NDEGE, SPM
NOVEMBER 14, 2024**

BETWEEN

FRANCIS OKWARA EMUNGOR CLAIMANT

AND

WINSTAR SECURITY GUARDS LTD RESPONDENT

JUDGMENT

1. Vide a Memorandum of Claim dated 29.04.2021, the Claimant herein, Francis Okwara Emungor, avers that his employment was unlawfully terminated by the Respondent herein, Winstar Security Guards Ltd. The Claimant avers that he was employed verbally by the Respondent in December 2016 as a guard and placed on an alternating schedule of 2 weeks of day shift and 2 weeks of night shift. That he was reporting to work at 6.00pm to 6.00am, or 6.00am to 6.00pm depending on shift arrangements and was not paid overtime dues by the Respondent. That he was granted 3 off duties every month instead of 4, hence against the provisions of section 27(2) of the *Employment Act*, 2007. That he further used to work during public holidays without being paid on double hourly rate as required.
2. He was earning Kshs. 12,000/= per month up to April 2018, and thereafter Kshs. 13,000/= per month from the month of May, 2018. That he was therefore underpaid by the Respondent contrary to the minimum wages applicable. That he served the Respondent continuously for a period of 3 years and 4 months, and was only granted 1 annual leave for the entire period, leaving out 3 years and 4 months of unattended leave.
3. That on 06/05/2020, he was granted leave without pay by the Respondent contrary to section 28(1)(a) of the *Employment Act*, 2007. It is his claim that he was terminated unlawfully and unprocedurally on 06.05.2020 without one month's pay for May, 2020, or being given notice by the Respondent hence in contravention of the provisions of sections 35(1) (c) and 36 of the *Employment Act* 2007. It is further his claim that he was not accorded a hearing by the Respondent before the termination, which was in contravention of the provisions of section 41 of the *Employment Act*, 2007.



4. He further claims that he was declared redundant unlawfully as per the content of a letter dated 06/05/2020, and has not been paid his terminal dues to date by the Respondent. It is generally his claim that his termination was unlawful and therefore prays for the following reliefs: -
- a. 12 months gross salary compensation under section 49(c) of the Employment Act 2007, laws of Kenya totaling to Kshs 193, 724.40/=
 - b. 1 month's gross salary in lieu of notice at Kshs 16,143.70
 - c. Underpayments totaling to Kshs. 121, 095.90/=
 - d. Normal overtime totaling to Kshs. 352,852.90/=
 - e. Off duties totaling to Kshs. 78,411.70/=
 - f. Public holidays totaling to Kshs. 70,270.05/=
 - g. Leave for 3 years and 4 months totaling to Kshs. 32,722.10/=
 - h. Severance pay for 3 years totaling to Kshs. 24,215.55/=
 - i. Salary for May, 2020 at Kshs. 16,143.70/=
 - j. Certificate of service
 - k. Costs of the suit to be borne by the Respondent
5. The Respondent in its Answer dated 21.06.2021 denied all the allegations contained in the Memorandum of Claim and averred that it is the Claimant who failed to report to work after his leave had ended on 04.06.2020 as was indicated in the letter dated 06.05.2020. That furthermore the letter dated 06.05.2020 did not serve as a termination letter or a redundancy letter. It therefore prayed that the claim herein be dismissed with costs.
6. During the hearing, the Claimant herein was the only witness in his case. He adopted his statement dated 29.04.2021, which mainly reiterated his averments in his Memorandum of Claim as aforesummarised. He stated that he is currently jobless. That he received the letter dated 06.05.2020, which he produced as CEXH NO. 4. According to him, the letter declared him redundant unprocedurally given the facts that he was not, and is yet to be, paid his pending dues. That he nevertheless reported back to work on 04.06.2020 and was verbally told, without reason, that he had been laid off. That there was no warning, show cause or redundancy letter before being laid off. The relevant part of his examination in chief was as follows: -
- ‘...I came back to work on 04/06/2020 and was told that I had no position there anymore. I was not given any reason for being laid off. There was no warning letter or show cause letter or redundancy letter’ (emphasis mine).
7. While being cross-examined, he stated that he was dismissed on 06.05.2020, but that he nevertheless still went back to work and was told that he no longer held any position with the respondent. He however stated while being re-examined that he was dismissed from work.
8. The Respondent called one witness, RW1, Michael Mutai, its assistant operations manager. He also basically relied on his undated statement, filed on 22.04.2022, which was produced herein as REXH. NO. 3. He confirmed that the claimant herein was their employee since. That he used to report to work at different hours with rest in between such that he had a break of 2 to 3 hours and would work the recommended hours. That he also went for 4 off duties per month and was paid annual leave every



year. He also confirmed that the claimant initially earned a salary of Kshs. 12,000/- which was then increased to Kshs. 13,000/=. That on 06.05.2020, the Claimant was sent on unpaid leave for a period of 1 month due to the outbreak of covid-19 when the Respondent was forced to downsize its operations. That each employee who was sent for such unpaid leave was given a date to report back to work. That after 1 month, all the other workers reported back to work and were therefore duly reinstated back to work. That the claimant herein, however, failed to show up and efforts to trace him have been futile. He denied that there was a communication on, or policy of, a declaration of redundancy. He denied that the company owes the claimant any dues.

9. In cross-examination, he confirmed that the last time the claimant worked with the respondent was on 06.05.2020. That the Claimant never reported back to work on 04.06.2020. That he made efforts to contact the claimant to no avail. That the efforts included him calling the referees indicated in their employment records. That the claimant went on leave as per the letter REXH. NO. 1. That all the communications to the employees are in written form and there was therefore no letter terminating the claimant as alleged herein.
10. There were submissions filed for both parties herein. There was a list of agreed issues filed by the claimant herein dated 26.06.2021. It had 11 issues. That was however before the hearing and written submissions herein. I now believe it is no longer an issue that the claimant was employed by the respondent as claimed. His monthly salary and other entitlements are no longer in issue. It is also not an issue that the claimant is currently separated from the respondent. It is the manner in which this separation occurred that is the main issue herein. I do therefore frame the issues for determination as follows:
 - a. Whether the Claimant was unlawfully terminated and/or declared redundant?
 - b. Whether the Claimant is entitled to the reliefs sought in the memorandum of claim?

Determination

Whether the Claimant was unlawfully terminated and/or declared redundant?

11. I do agree with the Respondent's counsel submissions that the Claimant's evidence on this is substantially contradictory. In his Memorandum of Claim and his statement he indicated that he was terminated on 06.05.2020 vide the letter dated the same day, produced herein as CEXH. NO. 4. In court he claimed that he went back to work on 04.06.2023, approximately, a month later and that he was told that he had been laid off, or that his position was no longer available. I did summarize the relevant part of his evidence on this hereinabove. The Respondent has vehemently denied that it did not terminate the claimant, or declared him redundant as alleged. That it is the Claimant herein who failed to report back. In other words, the respondent's case is that the Claimant herein deserted duty on his own.
12. On the issue of desertion, learned counsel for the Respondent cited the South African case of SACWU VRS DYASI [2001] 7 BLLR 731 (LAC) as quoted in Khulani Fidelity Services Group Vrs Commission For Conciliation Mediation And Arbitration & 2 Others JR 783/07, where it was held that desertion amounts to repudiation of the contract of employment which the employer is entitled to accept or reject. The acceptance of repudiation amounts to dismissal if employee once again tenders service. The Court went further in the SABC's case to say:

The real problem arises from circumstances of unexplained absence. Where absence is no more conclusive evidence of desertion (which is absence plus an intention not to return), than it is evidence of willful absence without leave (which axiomatically includes



an intention to return, albeit at a time of the employee's choosing). The means by which the employer established the existence or absence of the intention to return is the critical point of debate. What constitutes desertion is of course a matter of fact. In some instances, an unexplained absence for a reasonable period, that is to say, reasonable in relation to the employer's operational requirements, will establish the fact of desertion.

13. The position in Kenya is however that such an employee deemed to have deserted or absconded for an unfairly long period of time capable of being presumed a deserter, cannot be terminated without a letter. It therefore means that even if the Claimant herein failed to report back to work as alleged by the Respondent, the duty was on the Respondent to issue a letter of summary dismissal, notice to show cause or a warning as appropriate. To go silent on an employee who absconds duty or is in desertion of work is not and was never the solution. Such only negates the right on the employer, such as the Respondent herein, to dismiss such an employee.
14. The Kenyan law as currently designed thus does not appear to contemplate closure of employment contract through unilateral abandonment of the parties obligations under a contract of service. The contract can only be brought to closure as a result of the eventualities contemplated in sections 40 and 41 of the *Employment Act* (namely redundancy, incompetence, physical incapacity or gross misconduct) or through resignation or mutual agreement with or without notice under section 35 and 36 of the Act or upon insolvency of the employer under sections 66 and 67.
15. Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to closure until the employer act on it. In *James Okeyo Vrs Maskant Flower Limited [2015] e KLR* the court observed as follows: - '...the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.'
16. Section 35 of the *Employment Act*, 2007 requires the employer to issue a written notice of termination of employment. It is therefore not sufficient that the Claimant failed to report back. Far from it, immediately the claimant failed to attend duty after the expiry of the unpaid leave, the Respondent should have issued a letter terminating the employment relationship. Such was not done herein. The alleged desertion of duty by the Claimant as claimed by the Respondent was not regularized with a termination notice. As held by Justice M. Mbaru, in *Tabitha Mumbua Kimongo Vrs Shrink Park Ltd [2017] e KLR*, which was ironically cited by the learned counsel for the Respondent, such failure to regularize a claim of desertion with a termination notice amounts to an unfair labor practice.
17. Thus, the Respondent had an obligation, if it believed that the Claimant had absconded duty, to lawfully bring the contract of service to closure by invoking the provisions of section 44 of the *Employment Act* which permits an employer to terminate an employee who has absconded duty on ground of misconduct. Looking for the Claimant as claimed by the respondent herein is not enough. The claimant still had not waived his right to be availed the fair process or procedure before termination of his contract of employment.
18. That there is no longer an employment relationship between the parties herein is no longer in doubt. That relationship has since been terminated. The Respondent has proved that it was not by reason of redundancy, but due to the Claimant's desertion. The provisions of Sections 43, 44 and 45 of the *Employment Act* place the burden of justifying a termination on the employer. All the law requires of an employee is to provide prima facie evidence of a wrongful termination. Once this is done, it is for the employer to provide evidence to demonstrate that the separation was lawful. To this extent, the *Employment Act* has reversed the concept of burden of proof as encapsulated in section 107 of the *Evidence Act* so as to adopt the reverse burden of proof.



19. Addressing the issue, the Employment and Labor Relations Court in Peter Otabong Ekisa Vrs County Government Of Busia [2017] e KLR had this to say: -

The standard of proof as set out under section 47(5) of the Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words, the respondents bear the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities.

Whether the Claimant is entitled to the reliefs sought in the memorandum of claim?

20. Having found that the employment contract herein was unlawfully and hence unfairly terminated mainly on the fact of non-issuance of a termination letter to the Claimant. Compensation is therefore due. This claim is distinguishable from the claim in Tabitha Mumbua Kimongo Vrs Shrink Pack Limited, supra, as there is no proof of various warnings or gross misconducts from the claimant herein. I do find that the Claimant is entitled to compensation for unlawful termination assessed at Kshs 193,724.40/= whose tabulation is thus: Gross pay of Kshs. 16,143.70 X 12 months. The claimant is further entitled to Kshs. 16,143.70/= being one month's salary in lieu of notice.
21. As correctly submitted by the learned counsel for the Claimant, the Claimant was underpaid throughout the duration of his employment with the respondent. This is going by his salaries that were being paid to him vis-à-vis the minimum wages applicable for his class of employment. I have done the calculations and I do hereby assess the total underpayments to be Kshs. 121,095.60 and not 121,095.90, a slight variation, as submitted by the learned counsel for the Claimant. As correctly urged by the learned counsel for the Respondent, the underpayments for the period 01.05.2017 to 30.05.2018, a period of 12 months, reduces by 30 cents. The next 24 months are as from 01.05.2018 to 30.04.2020, and not 01.07.2018 to 30.04.2020, as indicated in the written submissions. That however appears to be a mere typographical error as it did not affect the number of months that were used in the computations.
22. On overtime dues, I again do agree with the learned counsel for the Claimant. The claimant worked for 12 hours each day, thus 3 hours overtime. There was no sufficient evidence adduced by the respondent to rebut this. The check lists produced herein were meant to prove that he had some breaks in between. There was no evidence of a reliever or any other person who replaced the claimant herein during the alleged break. There was no Human Resource policy or Manual or Regulation brought or produced by the Respondent to prove such a policy. The Respondent furthermore did not produce the contract of employment which had such a clause entitling the Claimant to the 3 hours break each day. The presumption is that no such policy or clause existed and the Claimant is therefore found to have been working for 12 hours each day. Moreover, the checklists were for the months of February and March 2017, and not for the entire period of the claimant's employment with the Respondent. I calculate the same at Kshs. 352852.95/=. The Claimant is however only entitled to what he pleaded, that is Kshs. 352,852.90/=.
23. Similarly, the claim for off duties or days dues succeeds. My assessment of the same totals to Kshs. 78,411.40/=. There was a calculation error in computing the dues for the first 5 months which adds to 8017.85 and not 8018.20 as submitted. Also, a calculation error in computing the following 12 months which adds to Kshs. 22,707.54/= and not Kshs. 22,707.50/= as proposed.
24. Evidence was led by the Claimant that he worked during public holidays and was never compensated by the Respondent. The Respondent never produced any muster roll to disprove the claim and in the



absence of sufficient tangible records to disprove this claim for public holidays dues, this court finds that the Claimant is entitled to the dues. He claims 37 public holidays only. Public holidays are found in *the Constitution*, *Public Holidays Act* and the various gazette notices issued under it, and various other laws such as the Assumption of the Office of the President Act etc. These are laws and notices made or issued under the laws, and therefore, by virtue of section 60(1)(a) of the *Evidence Act*, do not require proof. I accordingly take judicial notice of the fact that there were several public holidays during the period, especially occasioned by the elections of the year 2017. There were, in my assessment, 40 or more public holidays for the entire period in which the claimant herein was in employment with the Respondent. He has however only claimed for 37, and as such am bound by that number. I do therefore assess the dues awardable to him under this head at Kshs. 70,270.05/= as claimed.

25. Next is the claim for unpaid leave dues. Evidence was led by the Claimant that he worked continuously for 3 years and 4 months and was never granted leave or paid money in lieu of leave. The Respondent produced a letter dated 03/10/2019 approving the claimant's application for annual leave of 24 days with effect from 12.10.2019 up to 04.11.2019. The letter, produced herein as REXH NO. 1, is addressed to the Claimant herein and there is a signature of him having received the letter. The claimant however disputed that the signature on the letter is not his. Learned counsel for the Claimant has submitted that it was incumbent upon the Respondent to establish that the signature thereon belonged to the claimant. That in the absence of sufficient evidence to prove the same, it follows that the signature thereon does not belong to the claimant.
26. With due respect to the counsel, I tend to disagree. Sections 107 and 108 of the *Evidence Act* provides as follows with regards to the issue of burden of proof:

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- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

27. In the case of *Muruingu Kanoru Jeremiah Vrs Stephen Ungu M'mwarabua* [2015] eKLR the superior court held as follows with regard to the burden of proof:

....As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.

28. I also refer to *The Halsbury's Laws Of England*, 4th Edition, Volume 17, at paras 13 and 14: which describes it thus:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the



conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to act; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?

29. Applying the above provisions and holdings to the instant matter, I do find that once the Respondent had adduced the evidence in REXH. NO. 1, that an annual leave of 24 days was approved for the Claimant herein and that he signed for the same, the Respondent had by then discharged his burden under Sections 107 and 108 of the *Evidence Act*. The standard of proof herein is not higher than a preponderance of probabilities. The evidentiary burden shifted to the Claimant to adduce evidence to rebut the same. It was therefore incumbent upon the Claimant, and not the Respondent, to adduce admissible evidence that the signature thereon was not his. I thus do hereby rely on the evidence in REXH. NO. 1 and do hereby find that the Claimant herein was released to proceed for 24 days annual leave with effect from 12/10/2019 up to 04/11/2019, and was supposed to resume duties with the Respondent on 05/11/2019. Whether he took up the leave days as approved or not, is up to him. There is another evidence that he proceeded for leave in the month of May, 2020, even though it appeared as a forced one – forced by circumstances beyond the Respondent’s control. There was however no evidence of whether he proceeded for leave for the other years. I do therefore find him entitled to leave dues for 2 years only, and not the entire period of 3 years when he was in employment with the respondent. I do therefore calculate the same as follows: Monthly salary of Kshs16,143.70 multiplied by 26 days multiplied by 2 years; then divided by 30 days in a calendar month. That equals to Kshs. 27,982.41 =. this is then added to Kshs. 4,739.70 leave pre-rate for the remaining 4 months. I therefore assess the total due for unpaid leave at Kshs. 32,722.11/=.
30. The respondent did not tender evidence to prove that it paid the Claimant his salary for May, 2020. He is thus entitled the same at Kshs. 16,143.70/= being the salary entitlement for the entire month of May, 2020.
31. His claim for severance pay on account of being declared redundant appears ambiguous herein. It has not been proved that the claimant was declared redundant herein. Throughout this judgment, I have found that the Claimant was unlawfully terminated. This is a Claim and hence a judgment for unlawful termination and not a separation by way of a declaration of redundancy. As correctly submitted by the learned counsel for the Respondent, severance pay is only paid in clear cases where an employee has been declared redundant. Furthermore, a claim founded on a clear declaration of redundancy cannot be maintained at the same time with a claim for an unfair or unlawful dismissal. In other words, a dismissed employee cannot at the same time be declared redundant. I do hereby dismiss the claim for severance pay, having found it superfluous herein.
32. The upshot is that, judgment is hereby entered for the Claimant against the respondent as follows; that is: -



- a. 1 month's salary in lieu of Notice Kshs. 16,143.70/=
- b. Compensation for Unlawful Termination Kshs. 193,724.40/=
- c. Underpayments Kshs.121,095.60/=
- d. Normal overtime dues Kshs.352,852.90
- e. Off Duty of Days dues Kshs. 78,411.40/=
- f. Public Holiday dues Kshs. 70,270.05/=
- g. Leave Allowance Kshs. 32,722.11/=.
- h. Unpaid Salary for May, 2020 Kshs. 16,143.70/=
- Total: KSHS. 881,363.86/=
- i. The Respondent herein to issue the claimant with a certificate of service
- j. The claimant be and is hereby awarded costs of the claim

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 14TH DAY OF NOVEMBER, 2023

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Claimant's Counsel: Kairu

Respondent's Counsel: Ondande

Claimant: N/A

Ondande: Praying for 30 days stay of execution

Kairu: No objection.

14/11/24

CT: 30 days stay of Execution granted.

