

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
ELDORET**

ELRC APPEAL NO. E032 OF 2023

(Before Hon. Lady Justice Maureen Onyango)

RILEY FALCON SECURITY LIMITED APPELLANT

VERSUS

SILAS WERE KEYA

RESPONDENT

(Being an appeal against the Judgment of Honourable R.O. Odenyo (Senior Principal Magistrate) delivered on 16th November 2023 in the Chief Magistrates Court at Eldoret in CMELRC No. 240 of 2019)

JUDGMENT

1. The Appellant herein was the Respondent, while the Respondent was the Claimant in Eldoret CMELRC No. 240 of 2019 wherein the Respondent sued the Appellant vide a Statement of Claim dated 8th November 2018 seeking compensation and terminal dues for the alleged unfair termination of his employment on account of redundancy.

2. After hearing the parties, the trial court delivered its judgment on 16th November 2023 in favour of the Claimant awarding him Kshs 59,907.50, costs of the suit and interest.
3. The Appellant being dissatisfied with the said Judgement instituted the instant appeal vide the Memorandum of Appeal dated 29th November 2023 on the following grounds of appeal:
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 - i. The Learned Trial Magistrate erred in fact and in law in failing to find from evidence on record that there was an Employment Contract that regulated the terms and conditions of service between the Appellant and the Respondent.
 - ii. The Learned Trial Magistrate erred in fact and in law by misdirecting himself in making a finding that there was termination of employment at the instance of the Appellant as opposed to finding that the Respondent willfully resigned from employment.
 - iii. That the Learned Magistrate erred in law and in fact in finding that the Appellant had not proved their case on a balance of probability contrary to the evidence on record.

- iv. The Learned Trial Magistrate erred in law and in fact in failing to appreciate and consider the pleadings and the evidence adduced in support thereof.
- v. The Learned Trial Magistrate erred in law and fact in failing to attach due weight to Appellant's evidence and submissions and authorities attached thereto.
- vi. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
- vii. The learned Trial Magistrate erred in fact and in law by failing to appreciate the evidence tendered by both the Appellant and the Respondent and analyze and apply the correct law thereby arriving at erroneous conclusion that is not premised on evidence and the law in respect to unlawful termination to wit section 41 and 45 of the Employment Act, 2007

4. The Appellant prays for the following orders:

- a) This appeal to be allowed and the judgment and decree of the honourable Senior Principal Magistrate delivered on the 16th November 2023 be set aside
 - b) Judgment to be entered in favor of the Appellant against the Respondent
 - c) Costs of this Appeal and costs of subordinate court to be borne by the Respondent
 - d) Any other relief that this honourable court may deem fit to grant
5. The appeal was disposed of by way of written submissions. The Appellant's submissions are dated 24th January 2025 while the Respondent's submissions are dated 29th January 2025.

Appellant's submissions

6. The Appellant crystallized the grounds of appeal into the following two issues:
- i. Whether the Respondent's contract of service was unfairly terminated,
 - ii. Whether the trial magistrate erred in his decision

7. On the first issue, the Appellant submitted that the termination of the Respondent's employment arose from the Respondent's own decision to resign. Citing *Edwin Beiti Kipchumba v National Bank of Kenya Limited [2018]*, the Appellant argued that resignation is a unilateral act of an employee, and once communicated, it effectively terminates the employment relationship.
8. According to the Appellant, the Respondent tendered a resignation letter dated 7th April 2017, citing domestic challenges beyond his control. The Appellant maintained that there was no evidence to suggest that the Respondent had been denied leave or coerced into resigning.
9. Relying on section 107 of the Evidence Act, the Appellant asserted that the burden of proof lay with the Respondent to demonstrate that he was terminated on account of redundancy, and that he failed to adduce any evidence to support this allegation.
10. The Appellant further submitted that it produced evidence at the trial court showing that its contract with its client, Safaricom Limited, had been terminated, leading to the recall

of all guards for redeployment and it was then that the Respondent opted to resign.

11. The Appellant therefore contended that the trial court erred in finding that redundancy procedures were not followed, whereas no redundancy had occurred. Consequently, it was argued that the trial magistrate's judgment failed to reflect a proper analysis of the facts and the law, resulting in an unsustainable conclusion.
12. The Appellant urged the court to set aside the entire judgment of the trial court and allow the appeal with costs.

The Respondent's submissions

13. The Respondent set out the issues for determination to be:
 - i. Whether the Respondent was unfairly, unlawfully and unprocedurally terminated from employment by the Appellant on account of redundancy,
 - ii. Whether the trial magistrate applied the correct principles of law when awarding the Respondent, the house allowance and dismissing the other prayers,
 - iii. Who should pay the cost of the Appeal.

14. The Respondent, relying on *Julie Tupiran Njeru v Kenya Tourist Board* (Industrial Cause No. 886 of 2010), submitted that the Appellant failed to comply with the procedural requirements of redundancy as provided under the Employment Act.
15. The Respondent contended that on 31st March 2017, he was called with his colleagues to a parade by the Appellant's branch manager and informed that the contract between Safaricom Limited and the Appellant had come to an end, and their services were no longer required. This, according to the Respondent was contrary to sections 40, 41, 43, and 45 of the Employment Act, 2007.
16. The Respondent denied resigning as alleged by the Appellant and maintained that if any resignation letters were written, they were obtained under duress and misrepresentation, as the employees were told they would receive termination dues, which were never paid.
17. The Respondent submitted that he was neither issued with a termination notice nor informed in advance of the termination of the Safaricom contract. He further contended that neither the County Labour Officer nor the affected employees were

notified, contrary to the provisions of section 40(1)(a) of the Employment Act.

18. It was therefore the Respondent's submission that the termination of his employment was unfair, unlawful, and unprocedural.
19. In addition, the Respondent submitted that the awards by the trial court was justified as he had proved that he was unfairly terminated on account of redundancy, and that he never proceeded on leave during the course of his employment with the Appellant.
20. The Respondent prayed that the appeal be dismissed with costs and that the judgment of the trial court be upheld.

Analysis

21. This being a first appeal, this court is guided by the principles espoused in several decisions among them, **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**, to re-evaluate and re-examine the evidence adduced in the trial court in order to reach its own finding, taking into

account the fact that this court had no opportunity of hearing or seeing the parties as they testified.

22. Vide his Statement of Claim dated 8th November 2018, the Claimant (now the Respondent) averred that he was employed by the Appellant as a Security Guard with effect from January 2015 at a salary of Kshs. 10,500 including house allowance.
23. The Claimant averred that he served the Appellant with loyalty, diligence and commitment without any warning in his employment records until 31st March 2017 when he was unfairly terminated from employment on account of redundancy.
24. It was the Claimant's case that the move by the Respondent in terminating his services on account of redundancy was in total contravention of the procedure under section 40 of the Employment Act as the Respondent did not have a credible reason to render him redundant without following the procedure.
25. The Claimant sought to be awarded: -
 - i. One month's pay in lieu of notice Kshs. 10,500
 - ii. Severance pay Kshs. 10,500

- iii. Compensation for unfair termination Kshs. 126,000
- iv. Pro rate leave for 2018 Kshs. 1,837
- v. Leave dues Kshs 22,050

26. The Claimant contended that owing to the alleged unfair termination of his employment, he was entitled to terminal benefits and prayed for the following reliefs:

- a. A Declaration that the Claimant’s termination from employment on account of redundancy was unlawful, unprocedural and unfair,
- b. The sum of Kshs 170,887 as tabulated above,
- c. Certificate of Service,
- d. Cost of this suit and interests at court rates from time of filing suit until payment in full,
- e. Any other relief as the honourable court may deem just and fit to grant.

27. The Appellant (Respondent in the trial court) filed a Response to the Memorandum of Claim dated 5th October 2020 denying the Respondent’s claim that he was unfairly and unlawfully terminated from employment. The Respondent maintained that

the Claimant opted to resign out of his own volition without issuing a notice to the Respondent as provided for in the employment contract.

28. The Appellant prayed that the suit be dismissed with costs.
29. The suit was heard on 10th June 2021. The Claimant testified on his own behalf while the Appellant called Peter Olima who testified as RW1.
30. In his testimony, the Claimant stated that he was terminated from employment on the ground that the contract between the Respondent and a third party had lapsed. He averred that the Respondent's manager instructed him to write a resignation letter to facilitate payment of his terminal dues, but despite complying, he was not paid. He further stated that he did not proceed on leave during the entire period of his employment with the Respondent.
31. The Claimant added that he was issued with a cheque for Kshs. 6,372, which he clarified was a refund for uniform deductions.
32. Upon cross-examination, the Claimant stated that he was not coerced into signing the resignation letter. He explained that the Respondent did not sell uniforms, but deductions were

made monthly for uniforms, which were refundable upon return of the uniforms when an employee left employment. He further averred that he was not dismissed, but that his employment came to an end following the expiry of the contract between the Respondent and Safaricom.

33. The Respondent's Branch Manager testified as RW1. He stated that the Claimant was an employee of the Respondent and averred that the Claimant resigned on 10th April 2017. He further testified that the Claimant cleared with the Respondent through a clearance form dated 11th April 2017 and was paid his terminal dues via a cheque dated 14th June 2018. RW1 added that the Claimant did not issue any notice prior to his resignation.
34. After the close of the Respondent's case, the trial court delivered its judgment on 16th November 2023 in favour of the Respondent which judgment is now the subject of this appeal.

Determination

35. I have considered the Appellant's Record of Appeal and the submissions by both parties. The grounds of appeal may be summarized into the following issues for determination: -
- i. Whether the trial court erred in holding that the termination of the Respondent's employment was on account of redundancy and not voluntarily resignation
 - i. Whether the trial court erred in awarding the remedies as were awarded to the Respondent,
 - ii. What reliefs should issue.

Whether the trial court erred in holding that the Respondent's terminated from employment on account of redundancy

36. The Appellant contended that the Respondent voluntarily resigned from employment through a resignation letter dated 7th April 2017, citing domestic reasons beyond his control. The Appellant maintained that there was no evidence that the Respondent was coerced or compelled to resign and that once the resignation was communicated, the employment relationship was effectively terminated.

37. The Appellant further asserted that the burden of proving the alleged redundancy lay with the Respondent in accordance with section 107 of the Evidence Act and that no evidence was tendered to demonstrate that a redundancy occurred. It was also the Appellant's case that the termination of its contract with Safaricom Limited led to the recall of guards for redeployment, during which the Respondent opted to resign.
38. On his part, the Respondent denied resigning from employment voluntarily and maintained that he was coerced to write a resignation letter so that he could be paid his service pay. The Respondent averred that he was never notified of the termination of the Safaricom contract, nor was he issued with a notice of termination. He further contended that neither the County Labour Officer nor the affected employees were notified, contrary to section 40(1)(a) of the Employment Act.
39. From the record, it is not in dispute that the Appellant's contract with Safaricom Limited where the Respondent was deployed was terminated. The key issue is whether the Respondent's departure from employment was voluntary or amounted to a termination on account of redundancy.

40. In support of its position, the Appellant produced a resignation letter dated 7th April 2017 and a clearance form dated 11th April 2017.
41. While the dates appear sequential, the surrounding circumstances and the Respondent's testimony that he was instructed to write the resignation letter to facilitate payment of his dues raise doubt as to whether the resignation was genuinely voluntary.
42. As held in a similar case **Mwanza v Riley Falcon Security Services Limited (Employment and Labour Relations Cause 192 of 2018) [2025] KEELRC 461 (KLR) (13 February 2025) (Judgment)**, this court observed: -
- "24. Although the Respondent in its defence has averred that the Claimant's employment was not terminated on account of redundancy and that he resigned voluntarily, the failure to issue him with a 30 day notice rendered that whole process unfair. It matters not that the Claimant was to be redeployed as averred by the Respondent as this had not been communicated to him at the time he submitted his resignation letter. It is also worth noting that the Claimant resigned way later, that is on*

11th April 2017 after the expiry of the subject contract. As at the time he tendered his resignation letter, there is no evidence that he had been redeployed despite being out of employment for almost 2 weeks.”

43. It is worth noting that the cited case arose out of the same incident as the instant case.
44. Having found that the Respondent did not voluntarily resign, the court must consider whether the termination amounted to redundancy. The Appellant’s own evidence was that its contract with Safaricom Limited was terminated, leading to the recall of guards. This implies that the Respondent’s position became superfluous as a result of operational changes, which fits the definition of redundancy under section 2 of the Employment Act.
45. Section 40 of the Employment Act sets out the mandatory procedure to be followed in cases of redundancy, including the requirement for prior notice to the employee and the labour officer, as well as payment of severance dues. The Appellant did not demonstrate compliance with these procedural safeguards.

46. Accordingly, I find and hold that the Respondent's termination was on account of redundancy, and that the Appellant failed to adhere to the procedural requirements under section 40 of the Employment Act. The trial court therefore did not err in so finding.

Whether the trial court erred in awarding the remedies granted to the Respondent

47. Having found that the Respondent's termination was on account of redundancy, it follows that the termination was unfair for want of compliance with section 40 of the Employment Act and as such, the Respondent is entitled to compensation under section 49(1)(c) of the Act.

48. In its judgment, at page 100 of the Record of Appeal, the trial court awarded the Respondent five (5) months' salary as compensation for unfair termination. No other awards were made despite the finding that he was unfairly terminated from employment on account of redundancy. In his statement of claim, the Respondent had sought for one month's pay in lieu

of notice, severance pay, compensation for unfair termination, pro rata leave for 2018 and leave dues.

49. On the claim for one (1) month's salary in lieu of notice, the same is anchored on section 35(1)(c) of the Employment Act, 2007. The provision entitles an employee whose employment is terminated without notice to payment in lieu thereof. The Respondent is entitled to this relief which I award at Kshs.10,500.
50. On the prayer for leave dues, the Respondent testified at the trial court that he never proceeded on leave during his employment with the Appellant. No leave forms or other evidence was produced by the Appellant to prove that the Respondent went on leave. Having worked for the Appellant for 3 years, the Respondent is entitled to Kshs 22,050 which I hereby award.
51. On the claim for severance pay, section 40(1)(g) of the Employment Act provides that an employee declared redundant is entitled to severance pay at a rate of not less than fifteen (15) days' pay for each completed year of service. The

Respondent is therefore entitled to Kshs 10,500 under this head.

52. Lastly, regarding the claim for 12 months' salary compensation for unfair termination, as noted earlier, the trial court awarded 5 months' salary under this head. Having already awarded the Respondent severance pay under section 40 of the Act, the court finds that the award of 5 months salary was excessive. The same is set aside and replaced with an award of 2 months salary taking into account the fact that the Respondent was not granted the mandatory one month notification of redundancy under section 40(1) and the fact that he was deceived into signing a resignation letter to deny him his terminal dues. I have further considered the Respondent's length of service.
53. Accordingly, the judgment of the trial court is set aside and substituted with the following orders: -

- a. The award of five (5) months' salary as compensation for unfair termination is hereby set aside and replaced with an award of 2 months' salary as compensation. This is because the termination of the Respondent's employment was through an unfair redundancy disguised as a

resignation on the advise of the Appellant. The award further takes into account the length of service of the Respondent and the relevant factors under section 49(4) of the Employment Act.

- b. The Respondent is awarded Kshs. 10,500 as one (1) month's salary in lieu of notice
- c. The Respondent is awarded of Kshs. 22,050 on account of leave earned but not taken or paid for in lieu.
- d. The Respondent is awarded Kshs. 10,500 as severance pay

54. The Appellant shall meet the cost of this Appeal. The award of costs in the lower court is not disturbed.

55. Orders accordingly.

**DATED, DELIVERED AND SIGNED
THIS 6TH DAY OF NOVEMBER, 2025.**

**M. ONYANGO
JUDGE**