

REPUBLIC OF KENYA

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

ELRC APPEAL NO. E033 OF 2023

(Before Hon. Lady Justice Maureen Onyango)

RILEY FALCON SECURITY LIMITED.....APPELLANT

VERSUS

ISAAC LOTUKON KANDAGOR.....

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. 248 of 2019)

JUDGMENT

1. The Appellant herein was the Respondent, while the Respondent was the Claimant in Eldoret CMELRC No. 248 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. 10,500 as one month's salary in lieu of notice, Kshs 10,500 as severance pay, 10 months' salary compensation and Kshs 22,050 as leave dues. The Claimant was also awarded 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:-
 - 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 for determination:
 - 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 she 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 and his colleagues were called 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 award by the trial court was justified as he 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 26th November 2014 at a salary of Kshs 10,500 including house allowance.
23. The Claimant averred that he served the Appellant with 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 therefore 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 rata 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 Claimant testified on 10th June 2021 as CW1 and adopted his witness statement recorded on 8th November 2018 as his evidence in chief.
30. In his testimony, the Claimant stated that he was terminated from employment by the Respondent on grounds that the contract between the Respondent and Safaricom, where he had been deployed, had lapsed. He testified that he was not issued with any notice prior to his termination. He further testified that he did not proceed on leave during the entire period of his employment with the Respondent. The Claimant

stated that he was instructed by the Respondent's Manager, Peter Olima, to write a resignation letter in order to be paid service pay. He admitted receiving Kshs. 10,700, which he explained was a refund of deductions previously made from his salary on account of uniform.

31. Upon cross-examination, the Claimant stated that his employment contract was tied to the contract between the Respondent and Safaricom.
32. On re-examination, the Claimant maintained that he was never informed that his employment would automatically terminate upon the expiry of the contract between the Respondent and the third party.
33. The Respondent called its Branch Manager, Peter Olima, who testified as RW1. He stated that the Claimant resigned from employment on 10th April 2017. RW1 further testified that the Claimant cleared with the Respondent as evidenced by a clearance form dated 1st April 2017. He added that the Claimant did not serve the Respondent with any notice prior to his resignation. RW1 also stated that a sum of Kshs. 6,000 was deducted from the Claimant's salary.

34. Upon re-examination, RW1 maintained that the Claimant was paid his dues amounting to Kshs. 10,777 through a cheque.
35. 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

36. 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 Respondent was terminated from employment on account of redundancy,
 - i. Whether the trial court erred in awarding the remedies granted 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

37. The Appellant contended that the Respondent voluntarily resigned from employment through a resignation letter dated 10th 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 argued that once the resignation was communicated, the employment relationship was effectively terminated.
38. 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.
39. On his part, the Respondent denied resigning from employment 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.

40. From the record, it is not in dispute that the Appellant's contract with Safaricom Limited was terminated. The key issue, however, is whether the Respondent's departure from employment was voluntary or amounted to a termination on account of redundancy.
41. In support of its position, the Appellant produced a resignation letter dated 10th April 2017 and a clearance form dated 1st April 2017. The inconsistency in dates in the two documents raises doubt as to the voluntariness of the alleged resignation. It would be illogical for an employee to complete the clearance process prior to tendering a resignation. This inconsistency, therefore, corroborates the Respondent's contention that the resignation was not voluntary, but for purposes of payment of terminal dues at the request or directive of the Appellant.
42. 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. The averment of RW1 that the guards were to be redeployed is not supported by the evidence on record as the Respondent had not been deployed from the date of clearance on 1st April to the date of resignation on 19th April. Further, it was not demonstrated by the Appellant that its employees being redeployed were required to clear. It is evident that the Respondent's position became superfluous as a result of the termination of the Safaricom contract, which fits within the definition of redundancy under section 2 of the Employment Act.

43. 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.
44. 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

45. 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.
46. In its judgment, at page 102 of the Record of Appeal, the trial court awarded the Respondent ten (10) months' salary as compensation for unfair termination, one (1) month's salary in lieu of notice, leave dues amounting to Kshs. 22,050, and service pay of Kshs. 10,500. The Respondent was also awarded the costs of the suit and interest thereon. I will address these awards in separate heads as hereunder: -

- i. *One month's salary in lieu of notice*

The award of one (1) month's salary in lieu of notice 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 trial court therefore properly granted this award.

ii. *Leave dues*

The award of leave dues amounting to Kshs. 22,050 was equally justified. The Respondent testified that he did not proceed on leave during the entire period of his employment, and the Appellant did not produce any evidence to the contrary as required under sections 10 and 74 of the Employment Act.

iii. *Severance pay*

With regard to the award of 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's claim for severance pay was therefore well-founded, the Court having found that

the termination was on account of redundancy. The award of Kshs. 10,500 was thus properly made

iv. *10 months compensation for unfair termination*

Section 49(1)(c) of the Employment Act empowers the Court to grant compensation for unfair termination up to a maximum of twelve (12) months' salary, depending on the circumstances of each case. In the present case, the termination arose from the loss of the Appellant's contract with Safaricom, an event beyond its control. Having already been awarded severance pay under section 40 of the Act, I find the award of 10 months salary as compensation to be excessive and without justification. The same is set aside and replaced with an award of two months salary taking into account the unfair termination on account of redundancy, the failure to give notification of the redundancy to both the Respondent and the Labour Officer, the apparent tricking of the Respondent to resign on the basis that the same would facilitate payment of his service pay and the length of service of the Respondent.

47. In the upshot, the Court makes the following final orders: -

- a. The appeal partially succeeds.
 - b. The award of ten (10) months' salary as compensation for unfair termination is hereby set aside and replaced with an award of 2 months' salary.
 - c. The awards for one (1) month's salary in lieu of notice of Kshs 10,500, leave dues of Kshs. 22,050 and severance pay of Kshs. 10,500 are hereby upheld.
48. As the appeal has partially succeeded, each party will bear its costs of the appeal.
49. Orders accordingly.

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

**M. ONYANGO
JUDGE**