

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL NO E133 OF 2024

WINGUARDS SERVICES LIMITED

APPELLANT

VERSUS

MUSILI KITHAMA.....

RESPONDENT

(Being an Appeal from the Judgment of Hon. Lucy Khahendi Sindani delivered on 25th May 2024 in Mombasa CMEELRC Cause No. E 372 of 2024)

JUDGMENT

Background

1. At all material times, the Appellant was employed by the Respondent as a Security Guard from December 2018 until October 10, 2021, with a monthly salary of Kenya Shillings Twelve Thousand Six Hundred and Eighty. Alleging that the

Respondent terminated his employment unfairly, wrongfully, and unlawfully, the Appellant initiated the proceedings herein through a Memorandum of Claim dated June 30, 2022, claiming a cumulative sum of KShs. 1,511,280. Additionally, he sought that the Court order the Respondent to issue him a certificate of service.

2. The Appellant opposed the claim, contending that the termination of the Respondent's employment was not at their initiative. He absconded from duty. As such, the Appellant denied the Respondent's cause of action and entitlement to the reliefs sought.

3. Upon hearing the parties on their respective cases, the learned trial Magistrate, in her judgment, found the subject matter of this appeal in favour of the Respondent's claim, and awarded him a total sum of KShs. 407,090.94. Aggrieved by the entire judgment, the appellant challenges the same, citing eight grounds of appeal.

The Respondent's case before the trial court

4. It was the Respondent's case that he first came to the employment of the Appellant in December 2028, as a Service at a monthly salary of KShs. 12, 680. On 10th October 2021, the Respondent, without any lawful cause or justification, and without notice, unfairly terminated his employment.
5. The manner in which the termination was effected amounted to a summary dismissal against him. The dismissal was contrary to the provisions of Sections 40, 41, 43, 44 and 45 of the Employment Act.
6. He further asserted that his right to fair labour practices under Article 41, fair administrative action under Article 47, and fair hearing under Article 50, of the Constitution were violated by the Respondent when they purported to dismiss him from employment without a hearing.

7. The Respondent stated that in his employment, he used to work during all public holidays, but the Appellant did not compensate him for the work done during the public holidays.

8. He further asserted that throughout his tenure of employment, the Appellant paid him a salary that was below the minimum wages prescribed in the Regulation of Wages [General] Order, 2018.

9. The Appellant did not provide him accommodation or pay him a house allowance in lieu, in breach of paragraph 5 of the Regulation of Wages [Protective Services] Order 1998. According to the Regulations, they were supposed to pay him an equivalent of 15% of his basic monthly salary as a house allowance every month.

10. He asserted that he used to work from 6:00 a.m. to 6:00 p.m., thus 12 hours per day, instead of the regular

statutory eight working hours per day, as provided in Paragraph 6 of the Regulation of Wages [Protective Security Services] Order 1998. Despite working four extra hours daily, the Respondent neglected to compensate him.

11. He contended that in the circumstances of the matter, he was entitled to;

a) One month's salary in lieu of Notice.....KShs. 21, 783.60.

b) Salary underpaymentsKShs. 300,418.80

c) Compensation for unpaid house allowance.....KShs. 107,828.82.

d) Overtime
.....KShs. 811,107.

e) Compensation for public holidays worked..... KShs. 8,739.20

f) 12 months' gross salary for unlawful termination.....

KShs. 261, 403.60

g) Certificate of service.

The Appellant's case before the trial court

12. The Appellant presented one witness, Caleb Otieno, its Human Resources Manager, to testify on their behalf before the lower Court. The witness stated that the Respondent was employed on 1st December 2018 as a Dog Handler. His starting gross salary was KShs. 13,500. The salary included a house allowance. Throughout his tenure of employment, he was stationed in Mombasa.

13. It was a term of his contract of employment that he was entitled to a day off each working week. The employee was also entitled to 21 days of annual leave for every year worked. The Respondent took leave for the years 2019, 2020, and 2021.

14. The Respondent did not at any point in the course of his employment raise any concerns regarding salary underpayments. He also did not raise any concerns about unpaid overtime to his supervisor. He did not make any claim for overtime during her tenure.

15. On or about the beginning of October 2021, the service contract that existed between Kenya Revenue Authority and the Appellant came to an end. The Respondent's supervisor duly communicated that to him. He was informed that at the end of the said contract, he would be required to report to his supervisor for reassignment.

16. The witness stated that on 31st October 2021, the Respondent absconded from his employment. He did not report to his supervisor for reassignment. Instead, he joined the workforce of the Appellant's competitor, who had taken over the assignment at the Kenya Revenue Authority. The Respondent's employment was not terminated, therefore.

He returned to the Appellant, boots, and uniforms weeks after abandoning his employment.

17. The witness asserted that in the circumstances of the matter, the Respondent was not entitled to the reliefs sought. In fact, it is he who was liable to compensate the Appellant with a one month's salary in lieu of notice.

The Judgment by the Lower Court

18. After reviewing the pleadings, evidence, and submissions of the parties, the trial Court found that the termination of the Respondent's employment was substantively justified as he had abandoned duty, but procedurally unfair, as due process contemplated under the law was not adhered to. She entered Judgment in favour of the Respondent.

19. Consequently, the learned trial Magistrate awarded the Respondent two months' gross salary [KShs. 13,500] as compensation for unfair termination of his employment,

under section 49[1][c] of the Employment Act, one month's salary [KShs. 13,500] notice pay, compensation for unpaid allowance [KShs. 56, 052.44], compensation for salary underpayments [KShs. 49,728], Overtime compensation [KShs. 255, 621], and compensation for holidays worked without pay [KShs. 5, 188.90]. She awarded the costs of the suit to the Respondent.

The Appeal

20. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;

1. THAT the Learned Magistrate misdirected herself on the law and facts by concluding that the Respondent was entitled to one month's salary in lieu of notice despite the evidence tendered.
2. THAT the Learned Magistrate erred in law and in fact in concluding that the Respondent's salary was KShs. 15,607 despite the pay slip produced as an exhibit.

3. THAT the Learned Magistrate erred in law and in fact by concluding that the relationship between the Respondent and the Appellant was unlawfully terminated.

4. THAT the Learned Magistrate misdirected herself in the computation of the house allowance, noting that the Respondent's salary was consolidated.

5. THAT the Learned Magistrate erred in Law and in fact in the award for overtime and her use of the formulae used in the computation used for the alleged overtime due to the Respondent, since no proof was brought to establish the same.

6. THAT the Learned Magistrate misdirected herself in the computation of the award for the alleged public holidays due to the Respondent, since there was no proof for the same.

7. THAT, the learned trial Magistrate misdirected herself in her conclusion that the respondent was unlawfully terminated, and the award therein was not only excessive, noting the years of employment.

8. THAT, the learned trial Magistrate erred in failing to consider the submissions filed on behalf of the appellant demonstrating the lawful and proper procedure the Respondent was taken through before the termination.

Analysis and determination

21. This Court's role as a first Appellate Court is to reconsider the evidence, evaluate it, and draw independent conclusions. However, in executing this duty, it must bear in mind that it neither observed nor heard the witnesses testify and should make appropriate allowances in this regard. Refer also to **Selle & Another v. Associated Motor Boat Co Ltd & Others [1968] EA 123.**

22. I have carefully reviewed the grounds of appeal, the parties' pleadings, the oral and documentary evidence presented before the trial court, and the written submissions made by the respective counsel of the parties. In my view, this appeal mainly hinges on two key issues: (a) whether the Respondent's employment was unfairly terminated, and (b) whether the Respondent was entitled to the reliefs granted by the lower Court.

a. Whether the Respondent's employment was unfairly terminated.

23. It is undisputed that the Appellant was an employee of the Respondent from 1st December 2007 to 31st October 2021. The issue in contention before the trial Court, and now on appeal, is whether the termination was both substantively and procedurally fair in accordance with Section 45(2) of the Employment Act.

24. However, before further examining this issue, it is essential to highlight that Section 47[5] imposes two distinct

legal obligations on both the employee and the employer. Typically, these obligations are discharged sequentially. The employee is responsible for prima facie establishing that an unlawful termination has occurred by demonstrating, at the outset, that the termination was not in accordance with procedural and substantive fairness. It is only after the employee has met this initial requirement that the burden shifts to the employer to demonstrate that the termination was justified. Essentially, if the employee fails to satisfy their burden, their case fails at that stage.

25. The Respondent's witness statement [turned evidence in chief] and even his pleadings before the trial court were, in my view, quite sketchy. They did not clearly set out material facts. Regarding the crucial aspects of procedural and substantive fairness, they were too vague. The Respondent, besides broadly and vaguely asserting that the termination was without notice and without a valid reason, offered no further explanation. For instance, how was the

termination communicated? By whom was the communication done? When and where? he did not state.

26. Neither litigants nor their advocates should overlook the fact that when they seek the Court to accept and rely solely on their witness statement as evidence, such a statement must adequately articulate that party's case.

27. Considering the material presented to the trial court by the Appellant to demonstrate that the Respondent, of his own accord, left their employment to join a competitor's workforce, and weighing this against the Respondent's vague and generalised evidence, it would be unreasonable to conclude that he provided evidence capable of prima facie establishing procedural and substantive unfairness. Consequently, the learned trial Magistrate should have found that the Respondent did not fulfil his duty under section 47[5] of the Employment Act, and should have held that his claim for unfair dismissal was justified.

28. It is important to point out that the Respondent's submissions filed before this court do not appreciate the applicability of the twin legal burden provided for under Section 47[5] of the Employment Act.

29. I observe that although the Appellant was explicit from the outset regarding the manner in which the Respondent ceased their employment, the Respondent did not find it appropriate to contest this claim. Consequently, the assertion remained unchallenged and is regarded as a truthful statement. In the given circumstances, the Respondent is deemed to have resigned constructively from their employment. Therefore, he cannot be heard to claim procedural unfairness. The trial Court erred in holding that there was an unfair termination.

b. whether the Respondent was entitled to the reliefs granted.

30. This Court notes that the reliefs the Appellant sought in his pleadings before the lower court fell into two categories: those dependent on the claim for unfair termination, such that if the claim failed, these reliefs would also not be available to him, and those that were independent of the claim. As the reliefs of notice pay and compensation for unfair termination were based on the claim, they were not properly granted by the trial Magistrate. Their award is hereby set aside.

31. The Respondent's case, as it emerges from his pleadings, was that the Regulation for Wages [Protective Security Services] Order, 1998, applied to him. The Appellant did not in many respects adhere to the stipulations of the Order, hence his claim for the various reliefs that were independent of the claim for unfair termination of employment. As can be discerned from the Appellant's submissions, they do not seem to look at the Respondent's claim from this viewpoint. The submissions reflect a

complete ignorance of the stipulations of Section 48[1] of the Labour Institutions Act, which provides;

“48. Wages Order to constitute the minimum terms and conditions of employment.

1. Notwithstanding anything contained in this Act or any other written law

a) The minimum rates of remuneration and conditions of employment established in a wages order constitute a term of employment to whom the wages order applies and may be varied by agreement.

b) If the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall

be inserted in a contract in substitution for those terms.”

32. Section 2 of the Regulation of Wages [Protective Security Services] Order,1998, provides to whom it applies, thus;

“This Order shall apply to all persons employed directly or indirectly by an undertaking or part of an undertaking which is involved in the carrying on of any of the following activities-

a) Private investigation or security consultancy.

b) Guarding of industrial plants, banks, warehouses, shops, private homes, or any other property or establishment against theft, illegal entry or fire;

c) Escort of money or other valuable property.

Provided that persons employed in an undertaking or part of an undertaking which is operated by the Government, a local authority, a quasi-governmental body, a charitable or religious organisation or an educational body shall be excluded.

33. There is no doubt that the Wages Order applied to the Respondent, and Section 3 thereof bestowed on him a particular protection, aligned to Section 48[1], thus;

“3. Basic minimum wage

1) No person to whom this Order applies shall be employed at a basic minimum wage less favourable to him than that which is applicable to him under the First Schedule, having regard to his occupation and the area of employment.

2) An employee shall be issued on pay day with a pay slip indicating all earnings due to him and deductions made thereon in respect of any matter.”

34. So, when a Court of law considers and finds that the employer did not conform to the legal dictate that where Wage Orders apply to an employee, the conditions of employment and or payment or remuneration shall not be less, the employer shall not be heard to complain that the Court interfered with the doctrine of freedom of contract, when it resultantly directs payment of remuneration or

makes a computation for compensation hinged on the stipulations of the relevant Wages Order.

35. I am therefore not convinced that the learned trial Magistrate appeared to rewrite the contract for the parties, as argued by Counsel for the Respondent. In using the sum of KShs. 15,572 in her calculations of the compensation payable to the Respondent, the learned trial Magistrate explicitly stated that the amount was the prescribed minimum wage at the time. The Appellant has not challenged this finding.

36. The entire challenge to the reliefs awarded by the trial Court, especially those that were independent of the claim concerning unfair termination, was, with great respect, misguidedly based by the Appellant solely on the narrow principle of the doctrine of freedom of contract, without due consideration of the provisions of the Labour Institutions Act, 2007, and the Regulation of Wages [Private Security Services] Order, which would in the context of employment disputes serve as an exception to the doctrine. Having

stated this, there can be no foundation derived from the appeal before this Court to annul the award granted by the trial Court, except for the two aforementioned awards.

37. By reason of the premises, the Appeal herein partially succeeds. The learned trial Magistrate's finding that there was termination of the Respondent's employment, which termination was procedurally unfair, is hereby set aside. This Court replaces the same with its own to the effect that the Appellant did not initiate the separation, and therefore, there was no termination of employment. The awards under the heads notice pay and compensation for unfair termination are hereby set aside.

38. Each party to bear its own costs of the appeal.

39. Orders accordingly.

Read Signed and Delivered this 13th Day of November 2025.

OCHARO KEBIRA

JUDGE

ORIGINAL