REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E294 OF 2024

BRINKS SECURITY SERVICES LIMITED.....APPELLANT

-VERSUS-

PATRICK A MUDAKI…….....1ST RESPONDENT

WILLIAM ELIJAH KIMONDO NDERITU.....2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. P.K. Rotich (SPM) delivered on 23rd January 2024 in Nairobi MCLRC No. 229 of 2019)

CORAM

Before Lady Justice J.W.Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. P.K. Rotich (SPM) delivered on 23rd January 2024 in Nairobi MCLRC No. 229 of 2019 filed an amended Memorandum of Appeal dated the 29th of April 2025 seeking the following orders: -

    a) **The appeal herein be allowed with costs.**

    b) **The lower court suit Milimani Commercial ELRC Case No. 229 of 2019 be dismissed with costs.**

    c) **Such further orders as may seem just be made.**

ORIGINAL

GROUNDS OF THE APPEAL

2. The Honourable Magistrate erred in law and in fact by awarding the Respondents the alleged refund of uniform deductions, August 2018 salary, leave days, house allowance, overtime, underpayments, public holidays and unpaid off days, yet no evidence was brought by the Respondents to support the claims, the claims being specific in nature.

3. The Honourable Magistrate erred in law and in fact by awarding the Respondents the alleged refund of uniform deductions, August 2018 salary, leave days, house allowance, overtime, underpayments, public holidays and unpaid off days, yet the claims were time barred being of the nature of continuing damages/injuries, thus the Court had no jurisdiction to award the claims.

4. The Honourable Magistrate erred in fact and in law by awarding the Respondents one month's notice pay and 12 months' salary compensation yet the Claimant was summarily dismissed on just and proper grounds and further without consideration on the duration of service of the Respondents in the Appellant's employ.

5. The Honourable Magistrate erred in fact and in law by awarding the Respondents costs and interests following a finding in favour of the Respondents as above stated, on unsupported claims by law, facts and evidence.

BACKGROUND TO THE APPEAL

6. The Respondents filed a suit against the Appellant vide a memorandum of claim dated 14th February 2019 seeking the following orders: -

ORIGINAL

i. The Claimants' unilateral dismissal be termed irregular. wrongful and unfair.

ii. The Claimants be paid their terminal benefits as set out in paragraph 11 hereinabove amounting to Kshs. 10,423,054.42.

iii. The Respondent be ordered to compensate the Claimants for the loss of employment by unlawful termination at the equivalent of twelve (12) months gross salary.

iv. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

v. The Respondent to pay the costs of this claim.

vi. Interest on (ii) and (v) above at Court rates.

(pages 13-16 of Appellant's ROA dated 29th April 2025).

14. The Respondents filed their list of witnesses dated 14th February 2029; individual witness statements of even date; and list of documents of even date with the bundle of documents attached (pages 19-41 of ROA).

15. The claim was opposed by the Appellant who entered appearance and filed a memorandum of response dated 7th May 2019. They also filed a list of witnesses of even date; a witness statement of RAYMOND NZIOKA dated 26th April 2019; and a list of documents dated 7th May 2019 with the bundle of documents attached. The Appellant later filed a supplementary list of witnesses dated 9th September 2022 and a witness statement of ANNASTACIA MWENZWA dated 6th September 2022 (pages 42-61 of ROA).

16. The Respondents' case was heard on the 7th of August 2019 with the Respondents testifying in the case. They relied on their filed witness statements as their evidence in chief and PW1

ORIGINAL

produced the documents attached to their list of documents. They were cross-examined by counsel for the Appellant, Ms. Ndirangu (pages 125-130 of ROA).

17. The Appellant's case was heard on 26th September 2019 with the Appellant calling one witness: Raymond Nzioka, as RW1 who testified on behalf of the Appellant. He relied on his filed witness statements as his evidence in chief, and produced the Appellant's documents. He was cross-examined by counsel for the Respondent Mr. Onenga (pages 130-133 of ROA).

18. The parties took directions on filing of written submissions after the hearing. The Claimant complied.

19. The Trial Magistrate Court delivered its judgment on the 23rd of January 2024 allowing the Claimants/Respondents' claims to the tune of Kshs. 1,401,335.04 and Kshs.1,286,069.06 respectively, comprising of uniform deduction, one month's salary in lieu of notice, salary for August 2018, leave days, house allowance, overtime, underpayment, public holidays worked, 12 months' salary as compensation for unfair termination, and off days worked (judgment at pages 115-123 of ROA).

DETERMINATION

20. The appeal was canvassed by way of written submissions. Both parties complied

Issues for determination

21. Both the Appellant and Respondents submitted generally on the appeal in their respective submission dated 18th September 2015 and 1st October 2025.

22. The court having read the grounds of appeal was of the considered opinion the issues placed before it for determination in the appeal were -

ORIGINAL

A. Whether the trial court erred in fact and law in finding unfair termination.

B. Whether the trial court erred in fact and law in award of the relief.

Whether the trial court erred in fact and law in finding unfair termination.

Appellant's submissions

23. The Appellant was substantively justified in summarily dismissing the Respondents employment once the finding of guilt against the Respondents was entered in the Magistrates Court at Milimani in Criminal Case number 1645 of 2017-Republic v William Elijah Kimondo Nderitu and Patrick Avulala Mudaki found the Respondents herein guilty of failure to prevent a felony. 13. This is accordance with the provisions of section 44 (1) and (4)(g) of the Employment Act, 2007, which provides that;(1) "Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if- (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property." 14. On procedural fairness, the Respondents admit in their witness statements as above enumerated that the Appellant called the Respondents on the 4th October 2017, wherein the Respondents admitted to have been negligent in their assignments as asked for forgiveness therein. 15. The criminal matter above stated proceeded in court wherein the Respondents were found guilty of failing to prevent a

ORIGINAL

felony, a fact which is not in dispute. 16.While the criminal matter was proceeding, the Respondents continued to work at the Respondent although re-deployed to different sites as above stated. 17.The determination of the criminal proceeding informed the Appellant's decision to terminate the Respondents' employment summarily, thus, the matter was heard and determined exhaustively.

Respondents' submissions

24. FACTUAL BACKGROUND -The Respondents were employed by the Appellant as security guards from 2013.On 25th September 2017, while deployed at the Ministry of Public Works, a theft incident occurred leading to the filing of a criminal case in Milimani CMCCRC No. 1645 of 2017. On 4th October 2017, the Appellant summoned the Respondents, accepted their explanations, and issued cautionary measures. They were thereafter redeployed to other stations, where they diligently continued working for 11 months. The criminal court ultimately acquitted the Respondents of the charge of breaking into a building and committing a felony, finding no evidence of their participation. Despite having forgiven and redeployed them, the Appellant revisited the incident after the acquittal and, by letters dated 30th August 2018, summarily dismissed the Respondents. The criminal case was not part of the disciplinary issue raised by the employer in 2017. The court was not told that those proceedings ever affected the manner in which the Respondents rendered services to the Appellant. The trial court correctly found this 30th August 2028 dismissal to be both procedurally and substantively unfair and awarded the Respondents remedies under Section 49 of the Employment Act.

25. Finality of Disciplinary Action 9. My lady, the Respondents were issued with a warning letter in October 2017 following the theft incident of 25th September 2017. In that letter, the Appellant

ORIGINAL

expressly stated that the management had "observed this with great concern and decided to give one more chance to make up." The letter further warned the Respondents that repetition of such behaviour would occasion severe disciplinary action. (See pages 33 and 34 of the record paragraph 3 and 4) It is noteworthy that the warning letter made no reference to the disciplinary process being provisional or contingent on the outcome of the pending criminal case. On the contrary, its wording clearly shows that the Appellant had considered the circumstances and opted to forgive the Respondents, issue a caution, and redeploy them. This amounted to a conscious managerial decision to treat the matter as closed with the only reservation being future misconduct, not a revival of the same incident. The warning letter was duly entered in the Respondents' individual files. By redeploying the Respondents to new stations, the Appellant affirmed that it still trusted them to carry out their sensitive duties as security guards. If indeed the Appellant believed the Respondents were guilty of gross misconduct or dishonesty, the proper course would have been immediate dismissal in 2017, not issuing warning letters and retaining them as guards for a further eleven (11) months. The law does not permit an employer to punish an employee twice for the same offence/ incident. Once the Appellant issued the warning letters and redeployed the Respondents, the principle of finality in disciplinary action took effect. Once an employer has imposed a sanction, it is estopped from revisiting the same misconduct to mete out further punishment. The Appellant's subsequent decision to dismiss the Respondents on 30th August 2018 on the very same grounds was therefore a bad afterthought, there was no fresh misconduct. Such conduct offends the principle of substantive fairness under Sections 43 and 45 of the Employment Act and amounts to double jeopardy. The trial court was correct to make a finding and hold it as such. The Appellant in paragraph 8 of their submissions seeks to rely on the assertion that only the 2nd Respondent was issued with a warning letter, and that no suchletter exists for the 1st Respondent. With respect, this position is neither credible nor

ORIGINAL

consistent with the facts. First, both Respondents were implicated in the same incident of 25th September 2017. Both were summoned by the Appellant, both gave explanations, apologized for the oversight and both were thereafter redeployed to new stations where they continued working for the Appellant. It is therefore implausible that only one was disciplined while the other was not. Redeployment itself is a disciplinary outcome and an implicit indication of forgiveness. Second, if indeed the 1st Respondent was not issued with a caution, then the Appellant's decision to redeploy him without any sanction at all can only mean that management condoned his conduct and considered the matter closed. It would be mischievous for the Appellant to now suggest that the absence of a warning letter left the 1st Respondent in perpetual jeopardy, only to be dismissed almost a year later on the same incident.19. Third, the selective production of only one warning letter is an afterthought and undermines the credibility of the Appellant's case. If the matter was truly unresolved against the 1st Respondent, the lawful course would have been immediate disciplinary action in 2017 - suspension or termination. Not retention and redeployment for eleven months. In these circumstances, the trial court was right to treat both Respondents as having been disciplined in October 2017 and deployed to man other sites. The Appellant's attempt to now distinguish between them at this late stage is a clear misrepresentation designed to justify an otherwise unfair dismissal. This was equally never raised at trial. Section 43 and 45 of the Employment Act require that termination must be founded on a valid and fair reason. At the time of termination on 30th August 2018, there was no fresh misconduct. There existed no reason to warrant termination. Further, Section 41 of the Employment Act imposes a mandatory obligation to subject an employee to due process before dismissal: a show-cause notice, a hearing, and the right to representation. The Appellant did not comply with these requirements in August 2018The Court in Barasa v Kenya Forestry Research Institute (Cause E134 of 2021) [2025] KEELRC 1086 (KLR) (4 April 2025) (Judgment) In it's

ORIGINAL

holding sighted the case George Musamali v G4S Security Services Kenya Limited [2016] KEELRC 1665 (KLR) the Court stated as follows:- "A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers' human resource manual or as set out in the Employment Act or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee's guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be." This authority makes it abundantly clear that adherence to due process is not optional and cannot be dispensed with on the pretext of obvious guilt. The Appellant's failure to issue show-cause letters, convene a hearing, or afford representation to the Respondents rendered the dismissal fatally defective.

Decision on issue 1.

26. The grounds of appeal in this issue were-

A. The Honourable Magistrate erred in fact and in law by awarding the Respondents one month's notice pay and 12 months' salary compensation yet the Claimant was summarily dismissed on just and proper grounds and further without consideration on the duration of service of the Respondents in the Appellant's employ.

27. The trial court held as follows- '*It is not in dispute that the claimants were charged and convicted of the offence of failure to prevent a felony contrary to section 392 of the penal code and fined*

ORIGINAL

kshs. 50,000 and in default to serve 6 months in jail. However, the respondent had warned them vide warning letters dated 4th October, 2017. The 2nd plaintiff letter stated;

> *"You have been one of our guards assigned at the ministry of public works assignment it has been reported that you are reluctant to perform your duties as required of you. On 25th September, 2017 you left the door lock open and this led to theft of one computer monitor.*
>
> *You know very well that you are supposed to be careful in performance of your duties but ignored the same for your selfish ends when questioned on the same you accepted the lapse and requested to be forgiven. The above is an act of indiscipline and negligence in performance of your duties and will not be tolerated in the service especially from an in-charge like you.*
>
> *The management has observed this with great concern and therefore decided to give one more chance to make up.*
>
> *Consequently, you are hereby warned for this unbecoming behavior and repetition of the of the same will occasion a service disciplinary action taken against you.*
>
> *Be guided*
>
> *Yours faithfully,*
>
> *Brinks security services Ltd*
>
> *Raymond Nzioka*
>
> *Human Resource Manager"*

ORIGINAL

The 1st plaintiff was issued with similar warning letter. The warning letter were issued after the claimants sought forgiveness. Warning the 1st claimant was deployed to guard AIC Bomani while the 2nd respondent was assigned to guard Safaricom premises, at Westlands I agree with the claimants counsel that the issue of warning letters to the claimants was by itself a sanctive or penalty meter to them. To turn round and dismiss the claimants on 30th August 2018, after forgiving them 11 months before, was unfair and amounted to disciplining them twice on the same set of facts.

Once some form of disciplinary action is taken against an employee, the allegation forming of the disciplinary process can not be made the subject of future disciplinary action see Benson Mwaniki -vs- Best Fast cargo (k) limited (2015) eKLR.

In any event, before their dismissal the claimants were not issued with a show cause letter as required under section 41 of the supplement Act. The respondent also failed to show that the claimants were given any form of hearing before their dismissal. The termination of the claimants was, therefore procedurally unfair. This position is supported by the decision in standard Group Limited -vs- Jenny Luesby (2018) eKLR.

In the case it was held that;

"There are no exceptional circumstances that have been established by the respondent that the case against the claimant was so severe that she could not be accorded the basic minimum. That is notice and a hearing made before the summary dismissal. That hearing is as important as the law made it mandatory even in the worst cause scenario where an employee grossly misconducts oneself. The right to hearing is what amounts to meeting the time tenett of natural justice such a hearing in an employment relationship should be

ORIGINAL

conducted in the presence of the affected employee together with another employee of her cadre as this the fine meaning of a fair hearing.

*However, senior an employee is, where the case is that of misconduct, the seniority is not a justification for failure to meet the mandatory provisions of the law. It remains a sacrosanct duty for an employee to uphold. This was denied of the claimant and I find this to be unfair labour practice.''(*PAGES 117 TO 120 OF ROA).

28. There were 2 respondents. I garnered the appellant to say one of them was not issued a warning letter despite the finding of the trial court. The warning letter to William Kimondo (2nd respondent) was dated 4th October 2017 and was produced before the trial court(pages 33 and 34 of the ROA). The warning related to accusation of negligence that led to theft on 25th September 2017 at his post. The warning indicated he was given another chance to serve, and a repeat would lead to disciplinary action. The summary dismissal letter dated 30th August 2018 to the 2nd respondent related to the same incident and negligence and conviction for negligence in the criminal case as the 1st respondent. The court having re-evaluated the evidence before the trial court arrived at the same conclusion as the Hon Trial Magistrate that the 2nd respondent had already undergone disciplinary in the offence of negligence and been sanctioned vide the warning letter dated 4th October 2017 thus the subsequent dismissal letter of 30th August 2018 on same issue was tantamount to double jeopardy and unfair. In Selle & Another -V Associated Motor Boat Co. Ltd & Others [1968] EA 123, it was held thus: "...*this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are*

ORIGINAL

that this court must reconsider the evidence, evaluate it itself and draw its own conclusions..." The 2nd respondent could not be dismissed on the same charge of negligence despite the finding of the criminal court, as the employer exercised its management prerogative and forgave the 2nd respondent with a sanction of a warning.

29. On the case of the 1st respondent, the trial court held he was issued with a warning letter. The court did not find the same on record. In witness statement, the 1st respondent stated that he was summoned by the employer in the company of the 2nd respondent regarding the same incident, and after their explanations, they were issued with warning letters dated 4th October 2017(paragraph g of the witness statement of the 1st respondent at page 20 of ROA). The 1st respondent was equally issued with a summary dismissal letter of the same date as the 2nd respondent, with the exact same content. During the cross-examination of the 1st respondent, I did not find any question on the issue of a warning letter, yet he had raised the issue in the witness statement. During the exam in chief, the witness for the appellant told the court the letter of 4th April 2017 did not say they were forgiven but was a caution. That settled the issue of a warning letter having been issued to the 1st respondent. The court finds that the appellant had made a decision with finality on the issue in the warning letter as follows- ‘’*The above is an act of indiscipline and negligence in performance of your duties. It is unacceptable and will not be tolerated in the service, especially from someone in charge like you. The management has observed this with a great concern and has therefore decided to give you one more chance to make up. Consequently, you are warned for this unbecoming behavior and repetition of the same will occasion a severe disciplinary action taken against you.*’’ The court finds no basis to interfere with the finding of unfair termination by the trial court guided by decision in Mbogo v Shah [1968] EA De Lestang V.P (as he then was) observation at page 94: "*I think it is well settled*

ORIGINAL

that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.'' The finding of the trial court on the summary dismissal of the two respondents having been held as unfair is upheld.

Issue 2 -Whether the trial court erred in fact and law in awarding the relief.

Appellant's submissions

30. Following the above, the Respondents are not entitled to payment of one month's notice pay in lieu of termination. The lower court further erred in awarding the 1st Respondent and the 2nd Respondent one month's notice pay of Kshs.16,523/= and Kshs.16,583/= respectively and further calculating 12 months compensation based on the erroneous salaries as Kshs.198,996/= and Kshs. 198,006/= respectively. The Respondents had not exhibited any pay slip, contract or Minimum wage order to demonstrate that their salaries were Kshs.16,523/= and Kshs.16,583/= respectively as above stated. We rely on the Nairobi ELRC Court decision in Modern Mail Limited v Omollo (2025) KEELRC 1043 (KLR)where the court set aside an award for one month's notice pay for reasons that the Appellant therein was justified in summary dismissing the Respondent therein under section 44 of the Employment Act, 2007. (Refer to paragraph 81 and 82 of the decision annexed herein). In the event that the court herein is inclined to award the Respondents compensation for unfair termination on the issue of procedural fairness, we submit that 3 months' salary compensation is sufficient as per the findings in the above stated matter of Modern Mail Limited wherein the court substituted a finding of 12 months' compensation for unfair termination with 3 months' salary compensation (Refer to paragraphs 83 to 87 of the decision annexed herein).

ORIGINAL

b. The learned Magistrate erred in law and in fact in awarding the Respondent uniform deductions, underpayment, off/rest days, public holidays, house allowance, leave days, salary for August 2018 and overtime; claims that are special in nature and unsupported by evidence. The lower court wrongly awarded the 1st Respondent underpayment from the year 2015 to 2018 a period of 44 months totaling Kshs.207,708.90/= and the 2nd Respondent underpayment from 2015 to 2018 a period of 44 months totaling Kshs.207,708.90/=. The lower court also wrongly awarded the 1st and the 2nd Respondents off days of 63 months and 58 months amounting to Kshs.160,725.60/= and Kshs.147,969.60/= respectively. The lower court also wrongly awarded the 1st and the 2nd Respondents public holidays for 6 years each of Kshs.91,843.20/=. The lower court also wrongly awarded the 1st and the 2nd Respondents house allowance for 63 months and 58 months of Kshs. 136,269/= and Kshs. 125,454/= respectively. The lower court also wrongly awarded the 1st and the 2nd Respondents and overtime for 63 months and 58 months of Kshs.522,390.96/= and 480,931.36/= respectively, amounts which are unclear and not pleaded by the Respondents. The lower court also erred in awarding the 1st Respondent 75 days leave days of Kshs.47,835.58/= despite the fact that Appellant herein availed leave forms of the 1st Respondent to demonstrate that only 25 days were due to the 1st Respondent. (Refer to the leave form at page 51 of the Record of Appeal)..The lower court erred in awarding the Respondents salary for August 2018 of Kshs.16,583/= each, an amount which was unsupported by evidence like pay slips, contract or minimum wage orders. The Respondents did not avail any evidence including pay slips and work attendance records at the lower court in support of the said claims neither did the Respondents apply for production of any such records by the Appellant at the lower court. Thus, the claims are unsupported and ought to have been declined and dismissed by the lower court. We rely on the Court of Appeal decision in The German School Society & another v Ohany & another (2023) KECA 894 (KLR) wherein the court found that the claim for underpayment was

ORIGINAL

unsupported by evidence thus the award of underpayment/back pay by the superior court was set aside. (Refer to paragraph 75 of the decision as annexed herein).We also rely on the Court of Appeal decision in Maranga v BOG Cheptoroi Secondary Schools (2023)KECA 1121 (KLR) wherein the court at paragraph 36 the Appellant therein awarded March and November 2014 underpayments, periods which were proved by pay slips. The other periods as claimed were dismissed for lack of proof. (Refer to paragraph 36 of the decision annexed herein).We also rely on the Nairobi ELRC Court, appeal decision in Mungai v Gitau t/a Naramat Academy (2024) KEELRC 1262 (KLR) wherein at paragraphs 15 and 16 the court found that the lower court correctly dismissed the claims for underpayment, house allowance, off duty, public holidays, salary deductions, leave pay and overtime. For reasons that the claims are specific in nature and was not supported by evidence, thus not proved. We also rely on the Court of Appeal decision in Njuguna & 4 others v Marsh View Limited (2023) KECA 1650 (KLR) wherein the court found at paragraphs 14, 15 and 16 that the superior court had properly dismissed the claims for overtime, house allowance and leave allowance for lack of basis or proof. The court stated that the Appellant being the claimant therein had the duty to tender documentary evidence in support of the claims therein. It was not enough for the Appellant therein to provide the court with figures they allege that they are entitled to. We also rely on the Court of Appeal decision in Manyisa v Lavington Security Limited (2023) KECA 1376 (KLR) wherein the court dismissed the appeal for lack of documentary evidence in proof of the claims for underpayment, off days, public holidays and overtime. The court stated at paragraph 27 that "In the instant case, the appellant merely tabulate figures without evidence to 5 000005 support and prove the same; therefore, he did not discharge the burden of proof placed on him to prove the reliefs sought or the claims made". We submit that the Respondents herein having merely tabulated figures on claims of special damages and failed to avail evidence in support therein the claims for salary for August 2018, leave days,

ORIGINAL

house allowance, overtime, underpayment, public holidays and off days are unfounded and should be dismissed. On the issue of uniform deductions, the Respondents claimed that each month Kshs.200/=was deducted from their monthly salary towards uniforms. Although no evidence was tendered on the same, the Appellant was willing to pay the uniform deductions. c. The learned Magistrate erred in law and in fact in awarding the Respondent uniform deductions, underpayment, off/rest days, public holidays, house allowance, leave days, salary for August 2018 and overtime; claims that are statute barred; thus, the court lacked jurisdiction to award the claims. The Appellant further contends that the claims for uniform deductions, underpayment, off/rest days, public holidays, house allowance, leave days, salary for August 2018 and overtime are time barred under section 90 of the Employment Act, 2007; being claims that are continuing in nature and should have been brought within 12 months from the date of cessation thereof. The Respondent filed the statement of claim on the 20th February 2019 in the lower court and make the above stated claims as far back as the year 2015 to 2018 August, which is way more than a 12 months period, thus the claims are time barred and ought to be dismissed. We rely on the Court of Appeal decision in The German School Society & another v Ohany & another (2023) KECA 894 (KLR) wherein the court found that the claim for underpayment was a continuing wrong that ought to have been claimed within 12 months from the date of cessation therein as per section 90 of the Employment Act, 2007. We further rely on the Nyeri ELRC court decision in Stephen Kithuka Kamene v Lauren International Flowers Limited (2017) eKLR where the court found at page one that the claims for underpayment, overtime and public holidays were continuing in nature thus time barred. The claimant therein was terminated on the 24.10.2015 and filed the suit on the 14.03.2017 a period of more that 12 months from the date of termination. We also rely on the Machakos ELRC Court decision in Exotic Penina Fields Group Limited v Simiyu (2023) KEELRC 1830 (KLR) where the court found at paragraph 19 that unpaid leave days, unpaid

ORIGINAL

public holidays, unpaid 6 000006 overtime and salary underpayment were time barred as the claims should have been brought within 12 months from the date of cessation thereof. The termination therein was on 30.07.2019 while the statement of claim was dated 13.03.2021 and filed on that date or shortly thereafter. We also rely on the ELRC court decision in Elkana Jumba Kenyolwa v NEL Enterprises Limited (2019) eKLR where the court dismissed claims for annual leave, house allowance, off days and public holidays as they were claims brought after the lapse of the 12 months' period from the date of cessation therein.

Respondent's submissions

31. The Appellant's reliance on section 44(4)(g) and the criminal proceedings is misplaced. Summary dismissal under section 44 must still comply with sections 41, 43, and 45 of the Employment Act, yet the Respondents were never issued with show-cause letters, invited to a disciplinary hearing, or afforded an opportunity to be heard. The dismissal was therefore procedurally and substantively unfair. The criminal case also offered no justification. The Respondents were found not guilty. This judgement did not establish any misconduct. (See pages 54-56 of the record) The Court in Mbugua v Powermax General Electrical Merchants (Cause 1092 of 2018) [2024] KEELRC 620 (KLR) held What is more, by surcharging the Claimant, the Respondent effectively extinguished the allegations made against her and the said allegations could not be used as a basis for any further disciplinary action against her. It follows therefore that by using the same allegations as a reason for termination of the Claimant's employment, the Respondent breached the rule against double jeopardy. Similarly, the Appellant here acted unfairly and in bad faith by disciplining the Respondents twice for the same conduct. The award of one-month notice pay was proper under Sections 35 and 36 of the Employment Act. Since the Respondents were dismissed without notice and the termination was found unlawful, they were entitled to one month's wages in lieu of notice as a statutory right. The Appellant's contention on wages equally fails. Wage orders are matters of

ORIGINAL

public law and employers bear the duty to comply. The figures of Kshs. 12,211.20 and Ksh. 14,429 reflected the applicable statutory minimum basic pay for a night guard in 2015 and 2019 respectively. This was per the General wages and remuneration order of 2015 and 2017 (see attached orders). Now having been b. terminated in August 2018, these were the minimum wages applicable in computing underpayment payable. No further proof is required from the Respondents save for their payslips to be compared against the applicable wage orders. Considering the circumstances herein, the award of twelve months' salary was fully justified. The Respondents had served faithfully for 63 months and 58 months respectively which translates to five years, only to be subjected to double punishment, abrupt loss of livelihood without notice, and stigma despite having been acquitted. For this egregious conduct Section 49(1)(c) of the Employment Act, read with Article 41 of the Constitution, empowered the court to grant the maximum award. To reduce it would legitimise unlawful conduct by an employer, erode statutory safeguards, and diminish the respondents' right to fair labour practices. The learned magistrate did not offer a windfall; this was an exercise of judicial discretion which we have not been told was wrong or irregular to warrant interference by this court. Reasons were given for the award of 12 months by the trial court which stated as follows; "The claimants lost their source of livelihood without notice and for no justifiable reason having been forgiven on 4.10.2017, the claimants were deployed to work only to be dismissed one year later without notice and without hearing. This was quite unfair. This court therefore awards twelve (12) months gross salary as compensation." (see page 121 of the Record of Appeal) Whether the Learned Magistrate erred in Law and in Fact in awarding the Respondent uniform deductions, off/rest days, public holidays, house allowance, leave days, salary for August 2018 and over time; claims that are special in nature and unsupported by evidence. The trial court did not error in awarding these sums. Unlike general damages, employment entitlements such as house allowance, leave balances, overtime, and rest

ORIGINAL

days are statutory rights guaranteed in law through the Employment Act and Wage Orders. Once the Respondents alleged non-payment, section 10(7) of the Employment Act shifted the evidential burden to the Appellant, as the custodian of employment records (per section 74 of the Employment Act), to produce contracts, payslips, payment vouchers, muster rolls or attendance registers to prove the contrary. The Appellant failed to do so, leaving the court to work with the Respondents' materials and the evidence as presented during trial to wit: a. On uniform deductions, the Appellant's witness admitted deducting Kshs. 200 monthly (see proceedings at page 145 of the Record of Appeal) and stated that this money was part of the claimants' offered terminal dues in the memorandum of response. See pages 42 and 43 of the record. The contracts of employment - Remuneration part was indicated N/A. The section on remuneration was thus not applicable and no explanation was proffered at trial by the Appellant. (see pages 27 and 29 of the Record of Appeal) The same contract of employment; working hours under nature of duties clause (c) indicate 12 hours and that the Respondents were required to work during public holidays. The payslips at pages 28 and 30 of the Record of Appeal show a basic pay of Ksh. 8,500/=. There is no entry for house allowance, overtime or even public holidays. Both payslips confirm that the Respondents herein worked 30 days a month further justifying the payment of off days by the trial court. e. The appellant availed leave forms which showed that the claimant had a balance of 75 days (50 brought in from the year 2017 and a further 25 days as at May 2018 (see pages 51 and 52 of the Record of Appeal) f. The employer did not avail any material to show that upon termination the salary for August 2018 was paid, overtime, public holiday or a refund of the uniform deductions was paid. Based on the material placed before the learned trial magistrate. The court was justified in making the award. No error of principle has been cited to warrant this court disturbing any part of the award made therein. The authorities relied on by the Appellant are distinguishable, as in those cases the claimants failed to discharge even the initial burden of proof

ORIGINAL

and in others the employers rebutted the claims with kept records. In this case, documents were produced supported by sworn testimony and no rebuttal was offered by the Appellant. There was clear admission by the Appellant's witness that the Respondents worked for 12 hours and on a daily basis, that they would guard client's premises during public holidays, they have rest rolls showing when the Respondent rested but they have not availed them. (see pages 144 and 145 of the Record of Appeal). Finally, the claims were not time-barred under section 90. They crystallized at termination on 30th August 2018, and the suit was filed on 20th February 2019 was well within the three-year statutory limit. The Appellant's "continuing injury" argument is equally misplaced in that even if they were continuing injuries cessation happened at the point of dismissal which was 30th August 2018 and the claim herein was filed on 20th February 2019 which is barely 6 months after cessation of the injury.

Decision

32. The Trial Magistrate Court delivered its judgment on the 23rd of January 2024 allowing the Claimants/Respondents' claims to the tune of Kshs. 1,401,335.04 and Kshs.1,286,069.06 respectively, comprising of uniform deduction, one month's salary in lieu of notice, salary for August 2018, leave days, house allowance, overtime, underpayment, public holidays worked, 12 months' salary as compensation for unfair termination, and off days worked (judgment at pages 115-123 of ROA).

33. The grounds of appeal were-

    A. The Honourable Magistrate erred in law and in fact by awarding the Respondents the alleged refund of uniform deductions, August 2018 salary, leave days, house allowance,

ORIGINAL

overtime, underpayments, public holidays and unpaid off days, yet no evidence was brought by the Respondents to support the claims, the claims being specific in nature.

B. The Honourable Magistrate erred in law and in fact by awarding the Respondents the alleged refund of uniform deductions, August 2018 salary, leave days, house allowance, overtime, underpayments, public holidays and unpaid off days, yet the claims were time barred being of the nature of continuing damages/injuries, thus the Court had no jurisdiction to award the claims.

C. The Honourable Magistrate erred in fact and in law by awarding the Respondents one month's notice pay and 12 months' salary compensation yet the Claimant was summarily dismissed on just and proper grounds and further without consideration on the duration of service of the Respondents in the Appellant's employ.

D. The Honourable Magistrate erred in fact and in law by awarding the Respondents costs and interests following a finding in favour of the Respondents as above stated, on unsupported claims by law, facts and evidence.

34. Notice pay- the same was awarded for equivalent of 1 month salary. The court finds it was due for lack of procedural fairness and is upheld.

35. Uniform deduction- The payslip did not have deduction for uniform (page 28 and 30 of ROA). The respondent admitted they deducted 200 of unform per month. I find no basis to interfere with the finding of refund on uniform by the trial court (Mbogo v Shah).

ORIGINAL

36. On the maximum compensation- the trial court said the claimants had been forgiven on 4th October 2017 ,deployed to work only to be dismissed after one year without notice of hearing. The trial court on finding unfair termination may award maximum compensation on consideration of factors under section 49 (4) of the Employment Act to wit – '*4)A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—(a)the wishes of the employee;(b)the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and(c)the practicability of recommending reinstatement or re-engagement;(d)the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;(e)the employee's length of service with the employer;(f)the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;(g)the opportunities available to the employee for securing comparable or suitable employment with another employer;(h)the value of any severance payable by law;(i)the right to press claims or any unpaid wages, expenses or other claims owing to the employee;(j)any expenses reasonable incurred by the employee as a consequence of the termination;(k)any conduct of the employee which to any extent caused or contributed to the termination;(l)any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and(m)any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.''* Both respondents were employed in 2013, and their services were terminated in 2018. The termination related to an offence of negligence for which the employer had given them a second opportunity but upon being convicted of the same decided to terminate their services. The respondent had a record of

ORIGINAL

disciplinary and had served for approximately 7 years. They did not deserve award of the maximum compensation . The court found this was a matter in which the court ought to interfere with the discretion to award maximum compensation by the trial court and the same is reduced to equivalent of 6 months salary compensation.

37. On leave - The court evidence at cross-examination was that the claimants went on leave. The award of 75 days was unjustified, taking into account the provision of section 28 of the Employment Act, where only 18 months of leave could be carried forward. The court applied section 28(4) and reduced leave days to 18 months thus –**Kshs. 24,814.50/=**

38. On salary underpayment, the trial court applied the minimum wages as per the applicable regulations. The regulations are published in the Kenya Gazette. I find no basis to interfere with the underpaid wages as awarded(section 26 of the Employment Act applied).

39. On house allowance -the same is a statutory right under section 31 of the Employment Act and is upheld.

40. Overtime pay is allowed as it was supported by the pleadings and contract of employment stating the respondents were to work for 12 hours(page 27 of the ROA) and there was no evidence overtime was paid.

41. Public holidays- In the cross-examination the 1st respondent said he worked in all public holidays. The 2nd respondent claimed for 6 public holidays worked. In response, the appellant did not dispute the public holidays claimed and the same stood uncontroverted.

ORIGINAL

42. Off-days- The claim for off-days was not contested. The employee is entitled to one rest day under section 27 of the Employment Act –'***27. Hours of work.***

(1)An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.(2)Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.'' The award is upheld.

CONCLUSION

43. The appeal was successful in reduction of the compensation from maximum 12 months to 6 months gross salary award, and leave days for the 1st respondent reduced to 18 months under section 28(4) of the Employment Act. The Judgment and Decree of the Hon. P.K. Rotich (SPM) delivered on 23rd January 2024 in Nairobi MCLRC No. 229 of 2019 is set aside and substituted as follows-

Judgment is entered for the claimants against the respondent as follows-

a. A declaration that the claimants unilateral was irregular unlawful and unfair.

1st claimant

i. Uniform deduction kshs 2,400.00

ii. One month salary in lieu of notice kshs 16,523.00

iii. Salary for August 2018 kshs 16,583.00

iv. Leave days -**24814.50/=**

v. House allowance kshs 136,269.00

vi. Overtime pay kshs 522,390.96

vii. Underpayment - kshs 207,708.90

ORIGINAL

viii. Public holidays worked kshs 91,843.20

ix. 6 months compensation for wrongful loss of employment kshs 99,498

x. Off days worked kshs 160,756.60

Certificate of service

2nd claimant

i. Uniform deduction kshs 2,400

ii. One month salary in lieu of notice kshs 16,583.00

iii. Salary for August 2018 kshs 16,583.00

iv. House allowance kshs 125,454.00

v. Overtime kshs 480,931.36

vi. Underpayment kshs 207,708.90

vii. Public holiday worked kshs 91,843.20

viii. Off duty worked kshs 147,969.60

ix. 6 months compensation for wrongful/loss of employment Kshs 99,498/=

Certificate of service

x. Costs of this claim

xi. The appellant is awarded costs of the appeal.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF DECEMBER, 2025.

J.W. KELI,

JUDGE.

ORIGINAL

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Okumu

Respondent –absent

ORIGINAL