

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
MOMBASA**

APPEAL NO. E141 OF 2025

RADAR LIMITED APPELLANT

VERSUS

ERNEST MSHAMBA SAID RESPONDENT

**[Being an appeal from the judgment of Hon. T. N. Sinkiyan delivered on 7 July 2025 in
Voi CMELRC No. E006 of 2022]**

JUDGMENT

The appeal arises from the judgment delivered on 7 July 2025 in Voi CMELRC No. E006 of 2022.

The background to the appeal is a claim filed by the respondent, who alleges that he was employed by the appellant in January 2009 as a night guard at the SGR Voi station, earning Ksh. 19,006 per month. His case was that, on 8 November 2014, he was permanently employed by a letter of appointment. He worked until 3 February 2021, when he was served with a letter of contract extension dated 30 January 2021 stating that his employment would terminate on 31 March 2021. He claimed that work was 7 days a week, and that from January 2009 to January 2017, he was not allowed to take annual leave. On 12 December 2020, the Appellant undertook to pay service pay by letter dated 1 December 2020, but this was not done. There was no disciplinary case or payment of redundancy dues for the 12 years of service, leading to an unfair termination of employment. He claimed the following:

- a) Notice pay Ksh. 19,006.
- b) Unpaid leave for 7 years, KSh. 107, 457.
- c) Prorated leave from February 2016 to December 2016 for 11 months, KSh. 7,035.37
- d) Severance pay for 12 years Ksh. 157,896.
- e) 12 months' compensation Ksh. 228,072.
- f) Gratuity for years worked ksh. 157,896.

g) Costs of the suit.

In response, the appellant's case was that the employment of the respondent was regulated under the Regulations of Wages (General) (Amendment) Orders. The employees were placed on compulsory leave because the country was experiencing the COVID-19 pandemic, which resulted in the loss of work tenders. The government imposed a ban on rail travel; operations at the SGR were minimal, and there was no need for guards. The situation did not improve, leading to termination of employment. The respondent had signed a contract that was automatically renewed, which was based on the contract the appellant had with a third party. Due process was followed, with notice to the trade union and the labour officer, and the respondent was allowed to serve the redundancy notice. The claims made are without merit.

The learned magistrate heard the parties and held that the termination of employment was unfair, and judgment was entered as claimed, with costs and interest.

Aggrieved by the judgment, the appellant argues that the learned magistrate erred in law and fact in finding that the respondent was entitled to all the claims as pleaded. Notice pay was not due because a redundancy notice had been issued. The reliefs sought were time-barred. The leave pay awarded was not due under the law or ILO Convention 132; the finding of redundancy, and hence unfair termination of employment, was unsupported by evidence and therefore erroneous. The payment of gratuity is not due, and this is awarded contrary to the law. The award of severance and compensation was not justified, and the trial court failed to exercise its discretion properly.

The appellant submitted that it issued notice to the respondent before the termination of employment. There is an admission of receipt of notice dated 1 December 2020. In addressing the claim, the learned magistrate erred in awarding notice pay.

Regarding claims for accrued leave pay and public holidays, these are time-barred and relate to a time period outside the statutory limits under the Act. In **Togom v Radar Limited ELRCA E003 of 2023**, the court held that, upon consultation, employees must apply for annual leave before the employer can grant it. In this case, the respondent did not apply for annual leave, and the claim thereof is time-barred. Under section 28 (4) of the Act, such leave can only be used for a period of 18 months before termination of employment, as held in **Radar Limited v Daniel Jomo Machera [2022] eKLR**.

No redundancy was declared as alleged. The award of severance pay is not justified.

Gratuity pay must be under a written contract. In this case, there was no contractual agreement to pay gratuity as held in **Bamburi Cement Limited v William Kilonzo [2016] eKLR**. In this case, the respondent relied on the Wages (Protective Security Services) Regulations 1998. These wage orders were made in 1998 and are not applicable in this case as they have been revoked.

The appellant lost its contract with a third party. This matter was addressed in the employment contract. Once it occurred, it formed a valid reason for termination of employment as held in **Walwanda v Radar Security Limited [2022] eKLR**. Where parties have a written contract, the court should enforce its terms.

The appellant submitted that the circumstances of the case necessitated termination of employment and the issuance of notice, and that the awards of the trial court should be set aside with costs.

The respondent submitted that a notice was issued on 12 December 2020 stating that employment would terminate on 31 January 2020. However, through a notice dated 3 February 2021, the appellant extended the employment contract to 31 March 2021. Later, employment was terminated on 30 January 2021. There was no due process.

Notice pay is due in this case, as held in **Radar Limited v Amos Ogachi Nyaata ELRCA E091 of 2022**. The award of annual leave, severance pay and compensation is justified under section 40 of the Act following the redundancy.

Due to the unfair termination of employment, compensation and costs are justified. The appeal should be dismissed with costs.

Determination

Being a first appeal, the court is alive to its role as that of retrial of the case as expounded in previous decisions, including **Gitobu Imanyara & 2 Others V Attorney General [2016] KECA 557 (KLR)** and **Selle & another V Associated Motor Boat Co. Ltd [1958] EA 123**.

The respondent was under a written contract of employment. He was issued a letter of appointment dated 8 November 2014 as a night security guard.

Through a notice dated 1 December 2020, the appellant notified the respondent that employment would terminate due to redundancy with effect from 31 January 2020 (2021?). This was effectively a two-month notice period.

Nevertheless, through a notice dated 30 January 2021, the respondent's employment period was extended to 31 March 2021. However, he was not allowed to serve the extension period.

The appellant asserts that there was no redundancy or unfair termination of employment. The awards by the trial court were not justified.

The notice dated 1 December 2020 acknowledged that the appellant's assignment with the SRG had ended following the Chinese government's handover to the Kenyan government. Due to this operational issue, the appellant was unsuccessful in the tender application and was forced to terminate employment.

Notice issued to the trade union, to the labour officer and to the respondent.

Indeed, under section 40 of the Act, upon an operational issue, the employer may declare a redundancy. This arises out of no fault of the employee. It is not a disciplinary matter, as held in [Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others \[2014\] KECA 404 \(KLR\)](#).

However, upon declaring a redundancy, the employee affected, such as the respondent, is entitled to leave pay for accrued days and severance pay. Notice is due where this is not issued or the employee is allowed to serve notice as held in [Cargill Kenya Limited v Mwaka & 3 others \[2021\] KECA 115 \(KLR\)](#).

Based on the letter of appointment dated 8 November 2014, the respondent is entitled to severance pay of 15 days for every full year of service. At the wage of Ksh. 19,006/30x15x6 = Ksh. 57,018 in severance pay.

Notice pay is not due as this was issued on 1 December 2020 and the respondent worked until 31 January 2021.

For leave pay, the claim covers January 2009 to December 2016. Indeed, taking annual leave is a right under section 28 of the Act. However, leave is not accumulated beyond 18 months pursuant to section 28(4) of the Act as held in [The German School Society & another v Ohany & another \[2023\] KECA 894 \(KLR\)](#). The employee must apply for annual leave, and

where the employer declines it, such a form provides a reasonable basis for a claim outside the limitation period.

The claim for prorated leave from February 2016 to December 2016 is also addressed under section 28(4) of the Act. To claim after 5 years is time-barred and contrary to section 28(4) and 90 of the Act.

Regarding the claim for gratuity, the appellant appointed the respondent as a night guard by letter dated 8 November 2014. A night security guard's employment, unlike that of a general worker, is regulated under the Regulations of Wages (Protective Security Services) Order 1998. Under these Wage Orders, a security guard is entitled to gratuity pay at the end of his employment, as held in [Omanga v Lavington Security Limited \[2025\] KEELRC 604 \(KLR\)](#). In this case, employment termination was due to no fault of the respondent. Gratuity, as regulated under the applicable wage orders, is due for the 6 full years worked from 8 November 2014 to 31 January 2021. $19,006/30 \times 15 \times 6 = \text{Ksh. } 57,018$ in gratuity pay.

On the compensation claim, the appellant issued the respondent with a contract extension letter dated 30 January 2021. This letter is not contested. He, however, was not allowed to serve during the extension period. No due process was followed. This is contrary to sections 35, 41 and 45 of the Act.

However, the respondent did not offer his labour under the contract extension. The lapse in the notice and the circumstances leading to the redundancy, a payment of one month would ameliorate the injustice. The award of Ksh. 19,006 is sufficient.

On costs and interests, section 12(4) of the Employment and Labour Relations Court Act and Rule 73 of the Employment and Labour Relations Court (Procedure) Rules require that the award of costs and interest be justified. In this case, there is no justification.

The appeal analyzed above, the judgment in Voi CMELRC No. E006 of 2022 is reviewed with the following awards:

- a) Severance pay KSh. 57,018.
- b) Gratuity Ksh. 57,018.
- c) Compensation Ksh. 19,006.
- d) Each party bears its costs.

Delivered in open court at Malindi, this 11th day of December 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Davis Wekesa

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and