REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. E153 OF 2024

(Before Hon. Justice Ocharo Kebira)

RADAR LIMITED.....APPELLANT

VERSUS

RAPHAEL MUMO MUEMA.....RESPONDENT

[Being an appeal against the judgment of Hon. N.R Akee in the Chief Magistrate Court, Employment and Labour Relations Cause No. E 064 of 2020 delivered on 27th June 2024]

JUDGMENT

Introduction

1. Contending that at all material times he was an employee of the Appellant as a Night Guard, whose employment the Appellant terminated unfairly on or about 31st October 2018, the Respondent sued

the Appellant in the aforementioned cause for both declaratory and compensatory reliefs.

2. The Appellant resisted the Respondent's claim through a Memorandum of Response dated 17th August 2021, denying the Respondent's cause of action and entitlement to the reliefs sought.

3. After hearing the parties on their respective cases, and considering their evidence, and submissions by their Counsel, the trial Court entered judgment for the Respondent, granting him various reliefs. The judgment is the subject matter of the instant appeal.

The Respondent's case before the trial Court

4. It was the Respondent's case that he first came into the employment of the Appellant on 26th June 2012, as a Night Guard. He served the Appellant until 31st October,2018, when the Appellant terminated his employment. At the time of

termination, he was earning a monthly salary of KShs.17,820.

5. The termination letter did not specify the reasons for his employment termination. When he inquired with his supervisor, he was verbally informed that the reason was the lack of work for him and his colleagues.

6. The termination was effected without him being afforded a hearing, and or being informed of the reasons for the termination. The termination of his employment violated his right to fair administrative action, the tenets of natural justice, Article 41 of the Constitution of Kenya, 2010, and the provisions of ILO Convention 158.

7. Through the termination letter, the Appellant promised to settle his terminal dues in full; however, sub subsequently, they failed to.

8. The termination was on account of redundancy, which was unfair, procedural, and unlawful, as it did not conform to the stipulations of Section 40[1][a], [c], [e] and [g] of the Employment Act, 2007.
9. He argued that during his period of employment, the Appellant consistently denied him leave entitlement. Additionally, he worked on public holidays without receiving appropriate compensation and was not compensated for his house allowance throughout the duration of his employment.
10. He worked from 6.00 am to 6.00 pm, six days a week.
11. He further asserted that by reason of the premises, he was entitled to the following reliefs;
    a. Compensation for earned but unutilised leave days during the

period 26th June 2012 to 26th June 2018 .....KShs.86,357.88

b. Pro-rata leave for the month of 1st July 2018 to 31st October 2018.....KShs4,797.68

c. Severance pay for 6 years worked KShs.61,684.00

d. Gratuity for 6 years worked.....KShs.61,684

e. House allowance for the entire period worked.....KShs.203,148.00

f. Compensation for public holidays worked KShs.41,100.00

g. Compensation for unfair termination, twelve months' gross salary.....KShs.213,840

The Appellant's Case before the Trial Court.

12. The Appellant presented their Human Resources Manager, Beryl Odhiambo, to testify in support of their defence against the Respondent's claim.

13. It was asserted that at all times, the Respondent was paid his salary in conformity with the Regulation of Wages [General] [Amendment] Orders for all the respective years he was under the employment of the Respondent. His salary included a house allowance in accordance with the Regulations.
14. Further, the termination of the Respondent was preceded by a one-month notice in accordance with the provisions of Section 35 of the Employment Act. The Appellant was at liberty under the provision to terminate the Respondent's employment at will without any reason.
15. The Respondent never worked on any public holiday, and at the time of separation, he had exhausted all his leave days and the notice period had been duly served.

16. As the Respondent was not alleging redundancy, the relief sought of severance pay would not be available to the Respondent.

The Lower Court's Judgment

17. After hearing the parties and considering their evidence and submissions, the learned trial Magistrate found in favour of the Respondent's claim and awarded him all the reliefs he had sought.

The Appeal

18. Aggrieved by the learned trial Magistrate's judgment, the Appellant filed the appeal herein, putting forth the following grounds;

    i. *That the learned trial Magistrate erred in law and fact by reaching*

    a finding that the Respondent was entitled to reliefs sought yet the Respondent had failed to

discharge the burden of proof to the set standard.

ii. *That the learned trial Magistrate erred in law and fact in awarding the Respondent 12 months' gross salary as compensation for unfair termination, which award was excessive, in the circumstances.*

iii. *That the learned trial f Magistrate erred in law and fact by failing to appreciate that during his employment, the Respondent earned a consolidated salary that was inclusive of house allowance as per the Wage Order of the various years of service, hence he was not entitled to house allowance.*

iv. *The learned trial Magistrate erred in law and in fact in applying the wrong principles while awarding gratuity pay of KShs. 61, 684, yet the same was not an express term of the employment contract between the parties.*

v. *The learned trial Magistrate erred in law and in fact in applying the wrong principles while awarding public holiday pay of KShs.41,100, yet the Respondent failed to prove that he worked on public holidays.*

vi. *The learned trial Magistrate erred in law and in fact in applying the wrong principles while awarding severance pay of KShs. 61, 684, yet the Respondent's employment was not terminated on account of redundancy.*

vii. *The learned trial Magistrate erred in law and fact in applying the wrong principles while awarding unpaid leave pay of Kshs. 86, 357 .88 against the provision of section 28[4] of the Employment Act.*

viii. *The learned trial Magistrate erred in law and fact in failing to take into consideration the Appellant's pleaded case in its Memorandum of*

Response, its evidence on record and submissions filed on its behalf.

Analysis and Determination

19. I have carefully considered the pleadings and evidence presented in the lower court, and the submissions filed herein by Counsel for the parties, and conclude that the instant appeal turns on two principal grounds;

    a. Whether the termination of the Respondent's employment was unfair; and

    b. Whether the Respondent was entitled to the reliefs sought in his pleadings

_20. Before I delve further into these identified issues, it is imperative to appreciate the scope, ambit, and authority of a first Appellate Court when deciding first appeals. The jurisdiction of the first Appellate Court, when hearing an appeal, is as extensive as that of a trial Court. It is within the

power of the Appellate Court to evaluate all factual and legal aspects of the case. It is the duty of the first Appellate Court to examine and appreciate the entire evidence, and it may arrive at a conclusion different from that of the trial Court. The judgment of a first Appellate Court must reflect a conscious application of the mind, with findings supported by reasons on all issues, including the contentions advanced and argued by the parties. If the first Appellate Court reverses the findings of fact, it must closely scrutinise the reasoning provided by the trial Court and clearly state its own reasons for reaching a different conclusion.

20. In the case of **Prudential Assurance Company of Kenya Limited vs Sukhwinder Sigh Jutley and Another [2007] eKLR** on the role of a first Appellate Court, the Court of Appeal stated;

As a first appellate court, it is our duty to treat the evidence and material tendered

before the superior court to a fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we have not seen or heard the witnesses and giving due allowance for this - SELLE V ASSOCIATED MOTOR BOAT COMPANY LIMITED [1968] EA 123.

21. In dealing with this Appeal, I will give due consideration to the foregoing principles.

22. It is not in dispute that at all material times, the Respondent was an employee of the Appellant, whose employment was terminated by the latter through a letter dated 1st October 2018, which read;

"Re: Termination of Employment

We refer to the above matter and regret to inform you that your employment with the company has been terminated with effect from 1st November 2018. This letter serves

as a notice as stipulated in your contract with us.

We value the services you rendered to the company during the course of your employment and we will consider you in future where need arises.

The company shall undertake to pay your final dues in full, and in the meantime, kindly arrange to return all company properties and equipment in your possession.

We wish you well in your endeavours."

23. Looking at this letter, there isn't a reason set out for the termination of the Respondent's employment. Indeed, the Appellant admitted this when it averred in its pleadings, thus;

"6. The Respondent admits the contents of paragraphs 6, 7, 8, 9, and 10 of the memorandum of claim insofar as the

claimant was issued a termination letter. And insofar as terminating his services and the notice period, which was clearly indicated, and the claimant was given and further;

a. The Claimant was issued with a one-month Notice of Termination of Employment in accordance with Section 35 of the Employment Act, which requires that either party may, at their own free will, terminate their contract of service without any reason if the notice period is served."

24. In my view, the Appellant's interpretation of Section 35 of the Employment Act 2007 is entirely erroneous. The provision, which must be read in conjunction with the stipulations of Sections 43, 45, and 47 [5] of the Act, does not suggest that, under the Employment Act, termination of an employee's

employment without cause is permissible. It is imperative to explicitly state that termination of employment without cause is prohibited in Kenya. Any viewpoint that differs from this stance overlooks the doctrinal perspective underlying the legislation on unfair termination, which constitutes a significant intrusion into the common law by restricting the employer's typically broad authority to terminate an employment contract without substantive reasons, while also enforcing general procedural fairness standards in the dismissal process.

25. Section 47[5] of the Employment Act sets out two distinct legal burdens, placing one on the employee and the other on the employer in a dispute concerning the termination of an employee's employment. These burdens must be discharged sequentially, first by the employee and then by the employer. Undoubtedly, it is now trite through a

line of judicial precedent what the legal burdens entail. True, as Counsel for the Appellant submits, the employee bears the initial burden. His burden is to demonstrate, on a *prima facie* basis, that an unfair termination of employment or wrongful summary dismissal occurred. It is only then that the evidential burden shifts to the employer to justify the termination or summary dismissal.

26. The Respondent asserted that the Appellant terminated his employment without any reason, and not in adherence to the dictates of procedural fairness. The Appellant's vision, clouded by the misguided position that it was at all material times at liberty to end the Respondent's employment without cause, did not plead and tender evidence that the termination of the Respondent's employment was with reason, and demonstrate that, contrary to his allegation, he was given an opportunity to make a representation on any

grounds for the termination before a decision to terminate was made. Accordingly, it is not difficult to conclude that, contrary to the Appellant's submissions, the Respondent was able to discharge his legal burden under Section 47[5] of the Employment Act before the trial court.

27. Having concluded as I have hereinabove, I must state that the evidential burden shifted to the Appellant to prove that the termination was substantively justified and procedurally fair. Put another way, the requirements of Sections 43, 45, and 47[5] came into effect.

28. In the case of **Pius Isindu Machafu vs Lavington Security Guards Limited [2017] eKLR,** the Court of Appeal elaborated on the duty of the employer, once the employee discharges his obligation under Section 47[5] of the Employment Act, thus;

"There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal [section 43]; prove that the grounds are valid and fair[section 45]; prove that the grounds are justified [section 47[5], amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and a hearing before termination....."

29. Elaborating on the twin burden of proof contemplated under the provisions of section 47[5] of the Employment Act, the Court of Appeal in the case of **Muthaiga Country Club v Kudheiha Workers [2017] eKLR,** stated;

"The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47[5] of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43[1] and 47[5] of the Act that places the burden upon the appellant to prove the alleged reasons for the termination of the grievant's employment, and justify the grounds for termination of the employment."

30. Section 43 of the Employment Act places a legal obligation on the employer in a dispute regarding the termination of an employee's employment to prove the reason for the termination. In the event of default, the termination shall be deemed unfair by dint of section 45 of the Act. The learned trial Magistrate was correct in holding that, in the absence of a reason for the termination, the

termination of the Respondent's employment was unfair.

31. This Court notes the Appellant's Counsel's submissions to the effect that the termination was for a fair and valid reason. The Appellant's contract with a 3rd Party lapsed, and, as the Respondent's contract of employment was contingent upon that contract, it likewise lapsed. He placed reliance on the case of **Jared Mangera & 11 Others v Professional Clean Care Limited [2018] eKLR.** However, this Court finds that the submissions and the cited case do not aid the Appellant's case at all, for two reasons.

32. First, submissions are never a substitute for evidence. I have carefully considered the Appellant's witness statement [turned evidence in chief] and the oral evidence before the trial Court. The witness or the Appellant never advanced the reason supplied by Counsel in any manner. In

Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR, the Court of Appeal succinctly stated;

"Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law, and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

33. Second, parties are bound to plead their cases fully. In the case of **Daniel Otieno Migore v South Nyanza Sugar Co Ltd [2018] eKLR, the** Court stated;

"11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with pleadings is for rejection. Pleadings are the bedrock upon which all proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with pleadings. Any evidence, however strong, that tends to be at variance with pleadings must be disregarded. That settled position was reaffirmed by the Court of Appeal in the case of ***Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule &3 others [2014] eKLR,*** *which cited with approval the decision of the Supreme Court of Nigeria in* ***Adetuon Oladeji [NIG] v Nigeria Breweries PLC SC 91/2002,*** *where Adereji, JSC expressed himself thus on the importance and place of pleadings;-*

" ..... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in pleadings, or put in another way, which is at variance with the averments of the pleadings, goes to no issue and must be disregarded.....

34. In the case of **Malawi Railways Ltd v Nyasulu [1998] MWSC 3,** the Malawi Supreme Court of Appeal cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at P 174, whereof the learned author posited that;

"As parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of

pleadings.

..... for the sake of certainty and finality; each party is allowed to raise its own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he is to meet and cannot be taken by surprise at trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon specific matters in dispute which the parties themselves have raised by pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. Moreover, in such an event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence made or raised by or against a

party is equivalent to not hearing him at all and thus be a denial of justice.....

In the adversarial system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings, and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business'' in the sense that points other than those specifically mentioned may be raised without notice."

35. The Appellant would not be allowed to raise a point and rely on the same, yet it was not raised in its pleadings.

36. I now turn to consider whether the Respondent was entitled to the reliefs the trial Court awarded him. Before I delve further into the issue, it is important to note that whenever a Court grants certain reliefs in favour of a party, the reasons for the award must be stated. The practice of a subordinate court, or

any court for that matter, to simply return on reliefs sought “awarded as prayed” is inappropriate and should not be promoted. In adversarial litigation, it is essential to understand the specific reasons that informed the Court’s decision on a particular matter or issue. This constitutes decisional accountability on the part of the Court. The trial Magistrate should take note.

37. Among the reliefs that the learned trial Magistrate granted as prayed was gratuity. It bears repeating that gratuity is not a statutory benefit but a contractual benefit, available to the employee only where it is provided for in the employment contract or a Collective Bargaining Agreement. In the case cited by Counsel for the Appellant, **H. Young & Company EA Limited v Were Mbago [2016] eKLR**, the Court succinctly stated;

“This Court in Central Bank of Kenya vs Davis Kivieko Muteti [2009] eKLR, emphasised that

there is a difference between severance pay and gratuity. Gratuity, as correctly enunciated by this Court in Bamburi Cement v Farid Aboud Mohammed [2016] eKLR, denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the Employment Act it is usually payable under terms set out in a contract of service or collective bargaining agreement

Severance pay, on the other hand, is only paid under section 40(g) of the Employment Act where an employee is terminated on account of redundancy. See Hema Hospital vs Wilson Makongo Marawa [2015] eKLR. In the current appeal before us, the respondent was entitled to severance pay at the rate of not less than fifteen days' pay for each completed year of service."

38. There was no evidence placed before the trial Court showing that gratuity was a benefit that was

contemplated under the Respondent's contract of employment or in a Collective Bargaining Agreement. I agree with the Appellant's submissions that, in the circumstances, gratuity was not a relief available to the Respondent.

39. Section 49 [1][c] of the Employment Act empowers the courts to award compensatory relief for unfair termination of employment or wrongful dismissal. However, it bears repeating that the power is discretionary, exercised in light of the circumstances of each case. Counsel for the Appellant argued that the learned trial Magistrate, without giving any reasons, thus contrary to sound practice, awarded the Respondent the maximum compensation contemplated under the stated provision. In view of what I have stated hereinabove [para 36], I fully agree with the argument.

40. However, in my position as a first Appellate Court, I have carefully considered the circumstances of the termination, which, in my view, were without adherence to what the law expected of the Appellant as the employer, the length of service of the Respondent, and the fact that he did not contribute to the termination in any proven manner, and conclude that he was entitled to the compensatory relief, to the extent of eight month's gross salary.

41. The learned trial Magistrate's award of compensation for the unpaid house allowance was impugned on the ground that, at all material times, the Respondent received a consolidated salary that included a house allowance. Further, the salary exceeded the Minimum wage under the applicable Wage Orders at various times.

42. The Respondent, on the other hand, submitted that, under Section 31 of the Employment Act, the

employer is under a statutory obligation to provide an employee with reasonable accommodation or pay them a sufficient sum, as rent, in addition to wages or salary paid to them. as the Respondent asserted that the Appellant didn't discharge this obligation, it was incumbent upon the Appellant, as the custodian of employment records, to provide records to demonstrate that the amount the Respondent earned at all material times included house allowance.

43. I have carefully considered the Regulation of Wages [General] [Amendment] Orders 2012, 2013, 2015, 2017, and 2018, which were presented before the trial Court as evidence by the Appellant, and which I hold applied to the Respondent, and note that they support the Appellant's position that at all material times, the Respondent was paid above the minimum wages, and that the payments were inclusive of house allowance. In my view, the

Respondent did not discount this position. As a result of the wrong approach mentioned hereinabove, the learned trial Magistrate merely awarded the relief to the Respondent without considering the Wage Orders and how they related to the Respondent's claim. The Respondent was not entitled to the relief.

44. The award of compensation for work done during public holidays that was not paid for, which the Respondent submits was correctly made by the trial Court, is challenged by the Appellant on the ground that the Respondent did not prove that he worked during the public holidays. According to the Appellant, the Respondent had a duty under Section 109 of the Evidence Act to prove the assertion that he worked during public holidays without pay.

45. In support of its submissions, the Appellant relied on the case of **Patrick Lumumba Kimuyu v Prime Fuels [K] Limited [2018] eKLR,**

where the Court of Appeal stated;

"Whereas we appreciate that the Employment Act enjoins an employer to keep employment records in respect of an employee, that does not absolve an employee from discharging the burden of proving his/her claim. If anything, that burden weighed more heavily upon the appellant in view of the respondent's categorical denial that the appellant had worked on the days claimed. It behooved the appellant to first discharge the burden by showing that indeed he had worked on the public holidays and Sundays as contended. Only upon such proof would the evidential burden then shift to the

respondent to show that she paid for overtime worked. On the other hand, we note that the respondent produced before the court several receipts for allowances paid to the Appellant, which, given the paucity of evidence in support of the appellant's claim, could as well have been payments for public holidays and /or Sundays worked."

46. The Respondent, with precision, pleaded in paragraph 12[vi] the public holidays he worked but was not paid for, and maintained this position throughout the trial. The claim was not simply thrown to the court. In my view, and considering the provisions of section 74 of the Employment Act, with this, the evidential burden shifted to the Appellant to demonstrate either that the Respondent didn't work during the public holidays specifically pleaded in his Statement of Claim or

that, though he so worked, he received compensation for the same. In my view, if the Respondent did not work during the public holidays, nothing would have been easier for them than to tender the attendance records for those days in evidence.

47. This Court's foregoing reasoning, in my view, resonates with the Court of Appeal's statement in the case of **Jacob Osoro Manyinsa v Lavington Security Limited [2023] KECA 1376[KLR],** cited by Counsel for the Appellant, thus;

"26. It was not in dispute that the Appellant had been employed by the Respondent as a security guard. Secondly, there was no evidence tendered to prove any relief sought by the Appellant. <u>As an example, if he had said that he worked on Mashujaa day, in the year 2014, the employer could only dispute</u>

that by producing work logs.'' [Emphasis added].

48. This Court hasn't lost sight of the fact that in his oral testimony before the trial Court, the Appellant's witness stated "he did not request for public holiday". Undoubtedly, this constitutes an acknowledgement that the Respondent worked during the public holidays, as he did not request to be off duty.

49. By reason of the foregoing premise, this instant matter is distinguishable from the authorities cited by the Appellant. The Respondent was entitled to the relief as awarded.

50. The Appellant submits that the learned trial Magistrate erred in law when he granted severance pay, yet his claim was not a redundancy claim. This Court notes that the Respondent averred in his pleadings that his employment was terminated on account of redundancy, and that the termination

was unfair. He maintained this throughout the proceedings before the lower Court. The Appellant did not provide in its pleadings or evidence the reason for the termination of the Respondent's employment. Technically, therefore, it did not controvert the Respondent's version.

51. Further, I have considered the second paragraph of the termination letter, which reads;

> *"We value the services you rendered to the company during the course of your employment, and we will consider you in future where need arises."* [Emphasis mine]

52. In my view, this paragraph suggests that the Respondent was let go because, at the material time, his services were not required, which amounted to redundancy.

53. Having regard to the premises, I conclude that the Respondent was entitled to the benefit of

severance pay under section 40 of the Employment Act.

54. In his evidence in chief, the Appellant's witness stated, 'He has not applied for leave and was not denied a chance to proceed on leave." During cross-examination, he added, "He worked for more than 5 years. He had leave days." This evidence aligns with the Respondent's position that he was not permitted to take his annual leave at any point during his employment. The Appellant must understand that annual leave is a statutory right for the employee under section 28 of the Employment Act, and a corollary statutory duty on the employer to facilitate it. They cannot rely on the employee's failure to apply for leave as a defence for failing to facilitate the right, yet they cannot demonstrate that there was compensation in lieu.

55. In the upshot, the Appellant's Appeal succeeds only to an extent, thus;

a) **The learned trial Magistrate's award of gratuity in favour of the Respondent is hereby set aside.**

b) **The learned trial Magistrate's grant of the compensatory relief under section 49[1][c] of the Employment Act, twelve months' gross salary is reduced to eight months' gross salary, KShs.142,560.**

56. As the appeal did not succeed fully, each party shall bear its own costs of the Appeal.

READ, SIGNED AND DELIVERED THIS 29TH DAY OF JANUARY 2026

OCHARO KEBIRA

JUDGE

In the presence of:

Appellant: .....

Respondent: .....