

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL NO. E 038 OF 2024

HIPORA SECURITY SOLUTIONS LIMITED.....APPELLANT

VERSUS

ZACHARIA OTINO OMONDI.....RESPONDENT

*(Being an Appeal from the judgment of Hon. D.O. MBEJA (PM) delivered on
29th February 2024 in Mombasa ELRC cause No. E225 OF 2021)*

JUDGMENT

Background

1. Contending that at all material times, he was an employee of the Appellant, whose employment it terminated unfairly, the Respondent sued the Appellant in the above-mentioned suit seeking the following reliefs;

- a) One month's salary in lieu of notice (Kshs. 57,454).**
- b) Unpaid salary for November, 2020**
- c) House allowance for 72 months at the rate of 15% of his basic salary**
- d) Compensation for earned but untaken leave days for six years.**
- e) Compensation for unfair termination, twelve months' gross salary.**
- f) Salary payment for the remainder of the contract period, 7 months.**
- g) Compensation for overtime worked.**
- h) Unremitted NSSF contribution for 72 months.**
- i) Service pay.**
- j) Costs of the cause.**

2. The Appellant opposed the Respondent's claim by filing a Statement of Response dated 30th April 2021. It acknowledged that at all relevant times, but denied that his

dismissal from employment was unlawful or unfair, and disputed his entitlement to the reliefs sought.

3. Upon hearing the parties on their respective cases, the learned trial Magistrate entered judgment for the Respondent on the date aforesaid.

The Respondent's case before the trial court

4. It was the Respondent's case that he first joined the Appellant's employment as a security guard on 30th May, 2015, earning a monthly salary of Kshs. 21,500.
5. He stated that in October 2020, he lost his father. Subsequently, by letter dated 27th October 2020, he was granted compassionate leave, commencing on 28th October 2020 and lapsing on 5th November 2020.
6. Unfortunately, plans changed, and his father was interred on 8th November 2020. He informed the Human Resources Manager, Edward Ntonyiri, and his area supervisor, Alphonse Mshote, of the change of plans. They agreed that his

compassionate leave commences on 5th October 2020 to 14th November 2020.

7. Laden with post-funeral activities in his role as the firstborn of his late father, he could not report back to work on 14th November 2024. He informed the Human Resource Manager and the Supervisor of his predicament. They allowed him to report back on 20th November, 2020.
8. When he reported back to his station at Kwale on 21st November 2021, at night, he received a letter summoning him to a disciplinary meeting scheduled for 23rd November 2020 in Nairobi. Given that his station was far from Nairobi, he sought additional time from the Human Resources Manager to prepare and travel to Nairobi, but his request was declined.
9. Due to the short notice, he was unable to persuade a colleague to accompany him to the Nairobi meeting. He also lacked the funds to travel to Nairobi. On 23rd November, 2020, he arrived in Nairobi at around 12.30, only to be

informed by the Human Resources Officer that his employment had been terminated.

10. For fear of losing a job, he quickly crafted an apology letter and handed it over to the Manager. However, this did not change the situation.

11. The termination was unfair as the Respondent didn't give him adequate time to prepare and travel from Mombasa to Nairobi, accord him a fair hearing before terminating his employment, or consider his apology and the reason that contributed to his failure to report back to work in time, and issued him with a very short hearing notice.

12. He contended that the Appellant had no justifiable or valid grounds for terminating his employment. The termination was procedurally and substantively unfair.

The Appellant's case before the trial court

13. The Appellant's case was presented through the evidence of one witness, its Group Human Resources Manager, whose witness statement was adopted as evidence in chief. The

witness stated that the Respondent was employed under a fixed-term contract, which was to end on 31st June 2021. His monthly consolidated pay was KShs. 17,700 and KShs. 3,800 as retail security allowance.

14. The Respondent was granted compassionate leave by letter dated 27th October 2020, and a leave letter was sent to him on 28th October 2020. There was no extension or alteration to the leave days. The Respondent did not at any point engage the Human Resources Manager for any change to the leave schedule.
15. The Respondent only wrote a message to the Human Resource Officer, Nancy Mutai, on 28th October 2020, when he had already left his workstation.
16. The show cause letter was sent to the Respondent on 21st November 2020 at 4.35 pm. He therefore had sufficient time to prepare his defence and to attend the disciplinary hearing on Monday, 23rd November, 2020.

17. The witness asserted that he never at any time met the Respondent. The apology letter was sent to the Human Resource Officer, Nancy, via email on 23rd November 2020. The Respondent never appeared before the disciplinary Committee as scheduled on 23rd November 2020, nor did he bother to communicate his inability to appear.
18. The witness contended that the Respondent's employment was never terminated. He has a pending disciplinary case,
19. The Respondent utilised all his leave days, save for 11.5 days, which remained unutilized as of the date of his desertion. All the requisite statutory remittances on his account were dutifully made as and when they were supposed to.
20. The Respondent was a member of the National Social Security Fund and, as such, did not qualify for the benefit of service pay.

21. The Respondent, having deserted duty without giving a month's notice, and having been paid the salary for November 2020, owes the Appellant KShs. 10, 989.

The Judgment by the Lower Court

22. After hearing the parties and considering their respective cases, the learned trial Magistrate entered judgment for the Respondent, finding that he had proved his case that his employment was terminated unfairly and unlawfully. Consequently, the lower Court directed that he be paid one month's salary in lieu of notice, unpaid salary for November 2020, compensation for unfair termination, twelve months' gross salary, and salary for the remaining seven months of the contract term, all totalling KShs. 451, 500.

The Appeal

23. Unsatisfied with the judgment of the lower Court, the appellant filed this appeal, setting out the following grounds;

- a. THAT the learned trial Magistrate erred in law and in fact by entering judgment in favour of the Respondent against the Appellant when, on the contrary, the trial

Court misapprehended and failed to properly evaluate written submissions by the Appellant and evidence on record.

- b. THAT the learned trial Magistrate erred in law and in fact in failing to take cognisance that the Respondent was not wrongfully terminated from employment but engaged in gross misconduct and still had a pending disciplinary case.
- c. THAT the learned trial Magistrate erred in law and in fact in holding that the Respondent had proved his claim for unfair and unlawful termination and compensatory damages on a balance of probabilities.
- d. THAT the learned trial Magistrate erred in law and in fact by awarding the Respondent a total sum of Kshs. 451, 500 as compensation for alleged unlawful termination.
- e. THAT the learned trial Magistrate erred in law and in fact in failing to sufficiently appreciate that the Respondent's evidence was purely based on falsehoods and hypotheses with no basis at all.

- f. THAT the learned trial Magistrate erred in law and fact in failing to take into account the Appellant's evidence and submissions.
- g. THAT the learned trial Magistrate erred in law and in fact by making conclusions that are not supported by evidence on record,

Analysis and determination

24. In the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123**, the court pronounced itself as follows:

“...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 that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it

should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

25. I have thoroughly reviewed the grounds of appeal, together with the parties’ pleadings, the evidence adduced before the trial court, and hold that this appeal turns around three principal issues: (a) whether the Respondent’s employment was terminated at the initiative of the Appellant or at all. (b) whether, if the answer to [a] is in the affirmative, the termination was unfair, and [c] whether the Respondent was entitled to the reliefs granted.

26. Undoubtedly, the Respondent’s case before the trial Court was that his employment was terminated orally at the Appellant’s initiative, while the Appellant’s case was that he deserted duty and that a disciplinary case is pending against him. He has never been dismissed as alleged.

27. I have carefully considered the Appellant’s witness’s [RW2] statement, turned evidence in chief, and cannot hesitate to

point out that it is deliberately ambiguous as to whether the Appellant terminated the Respondent's employment, as alleged. The Appellant's witness firmly contended that the Respondent was invited to a disciplinary hearing on 23rd November 2020 but failed to attend. However, he is silent on this critical aspect; did the Committee proceed and decide the matter notwithstanding the Appellant's absence? If the Committee proceeded in any manner, were minutes taken? The letter dated 14th December 2020 does not mention the events of 23rd November 2020.

28. The foregoing leaves no option but to conclude that, as the Respondent asserted, the Respondent dismissed him verbally.
29. For an employee's employment to be lawfully terminated or for a summary dismissal to be considered fair, it must be demonstrated that both substantive and procedural fairness were observed, as commanded by Section 45(2) of the Employment Act. I have no doubt. The learned trial Magistrate appreciated this position. See also **Pius Machafu**

**Isindu vs. Lavington Security Guards Limited [2017]
KECA 225.**

30. Section 41 of the Employment Act, 2007, sets out a mandatory procedure that any employer contemplating the termination of an employee's employment must follow. The process has three principal ingredients: the information ingredient, the hearing ingredient, and the consideration ingredient. The absence of these ingredients or any of them in the process leading to an employer's decision to terminate an employee's employment renders the termination unfair by dint of the provisions of Section 45 of the Employment Act.

31. In most cases, a show-cause letter or an invitation to a disciplinary hearing serves to satisfy the information ingredient when well drafted, so that it is clear that the employer intends to take disciplinary action against the employee and the grounds for that intention.

32. I have carefully considered the show cause letter dated 21st November 2020 and conclude that it satisfies the

information requirement of the procedure contemplated under section 41 of the Employment Act. It explicitly sets out the Appellant's intention and the basis for that intention.

33. It is now a well-established principle that the hearing component of the process is fulfilled only when it is demonstrated that the employee was provided with a sufficient opportunity to prepare his defence and to respond to the allegations made against him. Determining whether an employee was afforded an adequate opportunity to prepare for his defence is contingent upon the specific circumstances of each case.

34. The Respondent contended that he received the invitation to the disciplinary hearing scheduled for 23rd November 2020 at 10:00 am, on the night of 21st November 2020. The notice was too short for him to prepare his defence and attend the disciplinary hearing to present it. The Appellant, on the other hand, contended that it was received at 4.35 pm. and that, in its view, the notice was sufficient. Considering that the hearing was scheduled to take place in

Nairobi and that the Claimant was stationed at Kwale, the one-day notice was, from any angle, too short.

35. I am convinced by the Respondent's assertion that he arrived at the venue of the disciplinary hearing only to be informed that he had already been dismissed. The fact that the Appellant's witness [RW2] chose to be ambiguous about the events surrounding the hearing scheduled for 23 November 2023 reinforces this stance. The short notice prevented the Respondent from being present to offer his defence.

36. By reason of the foregoing premises, I hold that the termination of the Respondent's employment was procedurally unfair.

37. Section 43 of the Employment Act places a legal burden on the employer in a dispute regarding an employee's employment to prove the reason for the termination. It is important to note that it is not enough for the employer merely to assert that the employee's employment was

terminated for this reason or that without demonstrating with sufficient evidence that the reason genuinely existed.

38. Section 45[2] places a further burden on the employer to prove that the reason or reasons for the termination were valid and fair. Where the employer fails to discharge both burdens, the termination shall, by operation of law, be deemed unfair.

39. This Court notes the Appellant's firm position that the Respondent's employment was not terminated. The disciplinary case against him for desertion of duty was still pending when the Respondent sued the Appellant. Thus, suggesting that, in the circumstances, it did not come under the purview of the requirements of sections 43 and 45 of the Act.

40. The Appellant submits that on 14 January 2021, it wrote to the Respondent's Counsel indicating the pendency of the disciplinary case. I am not persuaded by this argument for two reasons: first, the position I have taken hereinabove that the Respondent's employment was terminated as explained

by him. Second, if the disciplinary case that was to be heard on 23 November 2020 was not concluded on that date, what prevented it from being proceeded with and concluded before the Respondent lodged the suit in the lower court?

41. I note from the record that, blurred by this position that it took, the Appellant did not place any sufficient evidence before the trial Court on the allegation that the Respondent deserted duty, and that which the law requires an employer asserting desertion to prove, if the assertion had to succeed.

42. I have noted the Appellant's lengthy and well-thought-out submissions on desertion. However, they cannot assist in proving what they intend to prove: desertion. It is either that there was termination on account of desertion, or there was no termination. It cannot be both.

43. By reason of the foregoing premises, I see no basis to justify disturbing the lower Court's finding that the Respondent's employment was terminated at the initiative of the Appellant and unfairly.

44. The Appellant asserted that as the Respondent's employment was not terminated, the compensatory relief under section 49[1][c] of the Employment Act could not be available to the Respondent. Having agreed with the learned trial Magistrate's finding that the termination was unfair, the submissions are rendered irrelevant.

45. Legally, the authority to award the relief contemplated in the provision is discretionary. As such, an Appellate Court can only disturb its grant not freely, but if the specific factors required under law are established. It must be demonstrated that the trial Court acted on a wrong principle of law, or misapprehended material facts, or took into account irrelevant factors or failed to take into account relevant matters, therefore arriving at an erroneous estimate of the damages award. See also, **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47.**

46. One of the considerations under Section 49 of the Act in awarding relief pursuant to subsection 1 is the duration for

which the employee was expected to remain in the employment of the employer. In the case before the lower court, the employment contract had only 7 months left to run. When awarding the maximum compensation as prescribed in section 49[1]c] of the Act, the learned trial Magistrate did not take this pertinent factor into account.

47. It is in light of the above-stated factor that I find ground to disturb the learned trial Magistrate's award under Section 49[1][c] of the Employment Act from twelve months' gross salary to five months 'gross salary.

48. Under section 35 of the Employment Act, the Respondent's employment was terminable by a twenty-eight-day notice. Undeniably, this notice, which a summary dismissal would ordinarily disentitle an employee from, was not issued. Having found that the termination was unfair and wrongful, I have no reason to hold otherwise than that the Respondent was entitled to notice pay under section 36 of the Act, as the learned Magistrate found.

49. The learned trial Magistrate granted the Respondent salary for the remainder of the contract period. Undoubtedly, this is not a relief contemplated under Section 49 of the Employment Act. The Provision does not provide for anticipatory earnings. The Supreme Court in the case **Francis Ngokonyo & 2 others vs Telkom Kenya Limited SC Petition No. E009 of 2025** confirmed this position when it held that claims for anticipatory salaries or future salary earnings lack a statutory foundation under both the repealed Employment Act [Cap 226] and the current Employment Act, 2007. Such awards not only amount to unjust enrichment but also offend public policy and contradict the principle that contracts of employment are, by their nature, terminable. Damages for wrongful or unlawful dismissal are confined to what is contractually or statutorily provided for.

50. In the premises, the learned Magistrate erred in making the award. It is hereby set aside.

51. In the upshot, the Appellant's appeal succeeds partially, thus;

- a) The learned trial Magistrate's award of the compensatory relief under section 49[1][c] of the Employment Act is reduced to six months' gross salary, KShs. 125,000.
- b) The ward of salary up to the end of the contract period, seven months' salary is hereby set aside.
- c) As the success is partial, each party is to bear its own costs of this appeal.

Read, Signed and Delivered this 23rd Day of April 2026.

OCHARO KEBIRA

JUDGE.