

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. E095 OF 2023

(Before D. K. N. Marete)

LINNET DINNA MOKAYA..... CLAIMANT

VERSUS

FIDELITY SECURITY LIMITED..... RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Appeal dated 14th June, 2023. It is an appeal against the judgment in Milimani CMEL cause No. 1459 of 2021 and comes out as follows;

1. The trial court erred in law and fact in reaching a finding that the Claimant had been unfairly terminated in the absence of evidence to substantiate the same.
2. The trial court erred in law and fact in reaching a finding that the Claimant was terminated on account of redundancy contrary to the facts of the case but did not disclose redundancy.
3. The trial court erred in law and fact in making the following awards;
 - (i) Award of Ksh 8,711.00 in lieu of notice unwarranted

- (ii) Ksh84,199.50 service pay
 - (iii) Ksh137,331.70 overtime.
 - (iv) Ksh61,746.30 – public holiday
 - (v) Ksh14,000.00 - Covid deduction
4. The trial court erred in law and fact in completely disregarding without any lawful basis, binding case law and tenets of law which were cited and which were applicable in the circumstances of the case.

From the onset, this appeal is set out on the wrong premises and this has confused the entire appeal. The Memorandum of Appeal dated 14th June, 2023 cites the parties as Claimant and Respondent. Linnet Dinna Mokaya comes out as the Claimant whereas Fidelity Security Limited is the Respondent. The context of the appeal comes out in the reverse: the Respondent, Fidelity Security Limited is the actual Appellant whereas Linnet Dinna Mokaya is the Respondent. In any event, the appeal is a contest against the award to Mokaya who was the Claimant at the trial court. Confusion galore.

The Appellant in their written submissions dated 18th April, 2025 opened in reliance to the authority of **Mbogo vs Shah (1968) EA 93** on judicial discretion for setting aside a judgment thus

“I think it is well settled that this court will not interfere with the exercise of 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 not have taken into consideration and in doing so arrived at a wrong conclusion.”

The Appellant further submits that the Respondent was not unfairly terminated from employment. Instead, the Respondent business was adversely affected by the Covid 19 pandemic and vide a letter dated 3rd May, 2021 effective on 1st June, 2021, the Appellant communicated that Sarova Hotels Limited had terminated his security services including Sarova Panafric Hotel which was the respondent's place of assignment. This termination of security services affected both parties.

Later, a meeting was held by the Appellant's management together with all other affected employees and the Appellant informed the Respondent of the termination of his service by Sarova Hotels Limited. Here, it was mutually agreed that the Respondent's employment was not terminated and or dismissed due to loss of assignment and that the Respondent would proceed on unpaid leave to be recalled as soon as the Appellant was able to secure fresh business. This is evidenced in the minutes of the meeting dated 2nd June, 2021 annexed at page 42 of the Record of Appeal.

The Appellant further submits that in September of the same year, the Respondent was called back to work but did not respond or report back to work. The Respondent still remains in possession of his items like company uniform and *rungu* which are evidence that indeed, she was never terminated because were this the case, these items would have been returned to the Appellant at the point of parting ways.

The Appellant again submits that the Respondent's allegation that she was terminated from employment has not been proved to the required standards in that:

- a) *The Respondent did not produce any termination letter issued to her by the Respondent.*
- b) *The Respondent's testimony at the trial court to the effect that she was verbally terminated was not corroborated as she did not call any other witness to testify in support of her case.*
- c) *The Respondent's allegation was specifically denied by the Appellant at paragraph 5 and 6 of the Memorandum of Response, wherein the Respondents was put to strict proof of this allegation.*
- d) *The Respondent's witness was categorical during examination in chief and during cross examination that he did not verbally terminate the Respondent employment, stating that the Respondent in fact voluntarily deserted duty.*

The Appellant posits that it was the Respondent burden of proof to establish a case of unfair termination of employment as is required of Section 107 of the Evidence Act, Chapter 80, Laws of Kenya and not for the Appellant to prove that it did not terminate the employment of the Respondent as contended. The Respondent was expected to tender sufficient evidence to persuade and sway the court that on a balance of probabilities, she was unfairly terminated. This was not the case and this burden was not discharged. Had the Respondent gone back to work on 1st September, 2021, issues of termination of employment would never have arisen and she would still be at work but she chose to desert duty.

The Respondent is therefore not entitled to the reliefs sought and answers these as follows;

- (i) The claim for one (1) month's salary in lieu of notice remains unproven on the premises that there was no unlawful termination of employment in the first instance.
- (ii) No evidence was tendered in court to prove that indeed, the Claimant worked overtime. This was not an issue during employment and was not proved or corroborated.
- (iii) No evidence was tendered as proof that she worked during public holidays and this was not enlisted in the Statement of Claim. It was also not an issue during employment.
- (iv) The claim for accrued leave days is not payable as the Respondent had taken all her leave days and did not tender evidence to the extent that she applied for and was denied leave during her tenure of duty.
- (v) The claim for twelve (12) months compensation for wrongful termination of employment does not rise on the basis that the Respondent was not unfairly or unlawfully terminated from employment.
- (vi) Service pay is not payable as the Appellant used to deduct and remit NSSF pension contributions from the Respondent's salary to the NSSF. Service pay would therefore not arise per Section 35 of the Employment Act, 2007.
- (vii) The Claimant's salary was consolidated therefore house allowance does not arise.
- (viii) The Respondent has not tendered any evidence to establish that Covid allowance deductions were made, or at all. This claim also fails.
- (ix) There is also no evidence of salary deductions for purchase of uniform. Neither was evidence tendered to support a claim that the Respondent purchased uniform and submitted any receipts to the company for refund.

The Respondent's case and submissions is that she was employed by the Appellant as a security guard in 2012 and terminated from employment in 2021. Her further case is that on the date of such termination she had reported to work at Sarova Panafric Hotel whereby the Operations Manager ordered her to leave the premises. On enquiry as to the reasons for termination, the Manager informed her that he was acting on orders from above and that she should wait for a phone call from the Appellant. This was not to be and she still keeps the Appellant's uniform.

The Respondent further submits that while the Appellant denied terminating the Respondent's services, their witness confirms that there was a meeting on 2nd June, 2021 which the Respondent attended but did not sign the minutes. The Respondent denies such meetings and attendance. The Appellant further confirms that they have not paid the Appellant since June, 2021 but insists that she is still in employment – at page 90 of the Memorandum of Claim.

The Respondent in closing submits that their services were terminated instantly and no notice or show cause letter was served. There was not even a reference to redundancy and the Appellant *in toto* failed to comply with the requirement of Section 40 of the Employment Act, 2007 on the subject. The Respondent on this seeks to rely on the authorities of **OI Pejeta Ranching Limited vs David Wanjau Muhoro (2017) KECA 329 (KLR)** and **Thomas De La Rue (K) Ltd vs David Opondo Omutelema (2013) KECA 492 (KLR)** where the court set out the criteria applicable in cases of redundancy. The Respondent on the whole submits a case of unlawful termination of employment and justifies the decision of the trial court and the awards made thereof.

This is so. The Appellant has not tendered evidence to demonstrate a case of absconding duty by the Respondent. On the contrary, the Respondent has made out a case of unlawful termination of employment by the Respondent on the basis of evidence and unexplained nuances of the part of the Appellant. The trial court on a balance of probabilities established a case in favour of the Respondent to which this court agrees.

I am therefore inclined to dismiss the appeal with orders that each party bears their costs of the same.

Delivered, dated and signed this **17th** day of **April** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Miss Nyakoa instructed by Kisilu Wandati & Co. Advocates for the Appellant
2. Miss Amondi instructed by Wanyonyi & Muhia Advocates for the Respondent