



**Alsaidco Alarm Limited v Njeru (Civil Appeal 256 of 2017)  
[2023] KECA 1127 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1127 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 256 OF 2017  
K M'INOTI, F SICHALE & J MOHAMMED, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**ALSAIDCO ALARM LIMITED ..... APPELLANT**

**AND**

**JOSEPHINE MUNEE NJERU ..... RESPONDENT**

*(An appeal from the judgment of the Employment and Labour Relations Court at Nairobi  
(Mathews Nduma Nderi, J.) dated 3rd February, 2017 in ELRC Appeal No. 4 of 2014)*

**JUDGMENT**

**Background**

1. Josephine Munee Njeru (the respondent), was employed by Alsaidco Alarm Limited (the appellant) as a day watchman from 31st August, 1997 to 15th August, 2004 when she resigned from her employment.
2. The respondent's claim was that upon her resignation, she was not paid her terminal dues. This prompted her to file a plaint dated 4th September, 2007 before the Chief Magistrate's Court at Nairobi seeking her terminal benefits of Kshs 552,564.10 under the 1998 Regulation of Wages (Protective Security Services) Order, (the Order). The breakdown of the amounts claimed was as follows:



<b>S No.</b>	<b>Item</b>	<b>Amount</b>
	18 days worked in July 2004	2,700.00
	Payment in lieu of annual leave in 2004	3,600.00
	Refund of uniform deposit	1,200.00
	House allowance for 6years 11 months	56,025.00
	Traveling allowance for 344 days in 6 years	123,840.00
	Traveling allowance for 309 days in 2004	18,540.00
	Payment for holidays worked 66 days	27,495.60
	Overtime worked 4hours per day for 6years	315,792.00
	Service pay for 6 years	21,871.50
	<b>Total</b>	<b>571,064.10</b>
	Less monies received	18,500.00
	<b>Total claimed</b>	<b>552,564.10</b>

3. The appellant denied that the respondent was in their employment at any given time during the mentioned period and in the alternative that the respondent was fully compensated upon her resignation.
4. During her testimony, the respondent produced her work identity card and National Social Security Fund (NSSF) statement as evidence of her employment with the appellant because, she maintained, no pay slip or employment letter was issued to her by the appellant. She testified that some of the places she had worked in Nairobi included IPS building, Jubilee Insurance Building and MP Shah Hospital reception.
5. It was her further testimony that she issued her resignation notice to the appellant on July 18, 2004 due to fatigue. She produced her letter of resignation in evidence in which she claimed her terminal dues. She claimed to have gone on an unpaid leave, was not paid service pay and was also not refunded money for uniform upon returning the same. She claimed to have worked for 12 hours instead of 8 hours per day and claimed overtime in respect of the 4 extra hours that she worked per day for the 6 years worked.



6. The respondent further claimed salary for 18 days that she worked in July 2004, payment in lieu of annual leave not taken, house allowance for 6 years and 11 months at 15% of the basic salary, 66 days' payment for public holidays worked and travel allowance.
7. The respondent conceded that she was paid Kshs 18,500 in the presence of the Kenya Commercial Food and Allied Workers Union officials on 18th August, 2004 but denied that it was in full and final settlement of her claim.
8. The respondent's witness, Mr Simon Matiko Mwita (CW2) stated that he worked with her from 2nd February, 2000 when he was employed by the appellant. He confirmed that he was not issued with an employment letter but rather an employment card. He worked for the appellant for 12 years until 2012.
9. In the appellant's statement of defence, it denied that it had employed the respondent in the alleged capacity and time set out in the plaint.

The appellant further denied that it terminated the employment of the respondent and maintained that she was not entitled to the terminal benefits and general damages claimed. In the alternative, the appellant pleaded that if there was any sum due and payable to the respondent, the same was paid in full and the respondent has no further claim against the appellant.

10. The Chief Magistrate's Court dismissed the respondent's suit with costs and interest.
11. Aggrieved by that finding, the respondent filed an appeal before the High Court. The file was referred to the Employment and Labour Relations Court (ELRC) with an order that the matter starts afresh as the proceedings in the lower court could not be traced.
12. The ELRC (Nduma Nderi, J) in his determination found the testimony by the respondent and her witness to be consistent and credible and that the terminal benefits claimed were consistent with the Order. The court noted that the appellant did not call any witnesses to rebut the evidence adduced and made bare denials of the particulars of claim and had even denied in the plaint that it had ever employed the respondent, a position that counsel for the appellant had retracted in court.
13. The learned Judge entered judgment in favour of the respondent against the appellant for Kshs.410,184.00 which was the total amount claimed amounting to Kshs 552, 564.10 excluding the travel allowance of Kshs 142,380.00 which the learned Judge found was not provided for under the Order.
14. Dissatisfied with the said judgment, the appellant filed the instant appeal in which it raised grounds of appeal to wit that the learned Judge erred in law and in fact in awarding to the respondent: judgment in her favour yet she failed to prove her case on a balance of probability; special damages not specifically proven; gratuity whereas the respondent resigned on her own volition; failing to consider the judgment of the lower court in which the court held that the respondent had failed to establish a reasonable degree of probability; judgment on evidence not connected to the respondent; disregarding the appellant's submissions; failing to consider the evidence by the appellant; and making a finding not supported by law or the evidence adduced.

### **Submissions by Counsel**

15. The appeal was disposed of by way of written submissions. Learned counsel for the appellant, Ms. Wangeci holding brief for Mr Charles Madowo submitted that the respondent failed to produce evidence in support of her claim as to the terms of employment, salary paid or payment of allowances. Counsel maintained that it is trite law that special damages must be specifically pleaded and strictly proved. (See:Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR).



- Counsel asserted that in the instant case no evidence was adduced as proof of special damages and that the speculated items in the statement of claim were hypothetical sums made up by the respondent.
16. As regards gratuity, counsel submitted that Regulation 17 of the Order entitles any employee who has worked for an employer continuously for 5 years to gratuity at the rate of 15 days per year of service. Under Regulation 17(2) thereof, the benefit is not available to an employee who terminates his or her employment for any reason other than ill health or retirement. To buttress this argument, the appellant relied on the case of *Fidelis Mwanyumba v Total Security Surveillance* [2015] eKLR.
  17. Counsel further submitted that the respondent failed to demonstrate that she was entitled to a refund of the uniform levy under the policy. The appellant faulted the learned Judge for failing to consider its submissions as well as the judgment by the lower court and proceeded to consider evidence not connected to the respondent's case. Further, that the evidence of the witnesses was not reliable as they were not aware of the terms of employment agreed upon between the respondent and the appellant.
  18. Learned counsel for the respondent, Mr. Gitonga Wambugu submitted that the appeal is incompetent for failing to meet the mandatory requirements of Rule 87 of the Court of Appeal Rules, 2010 which cannot be cured by the filed supplementary record. To buttress this submission, the respondent relied on the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR and urged that the appeal be dismissed and the impugned judgment be upheld.

### **Determination**

19. We have considered the record, the submissions, the authorities cited and the law. We shall first determine whether the appeal should be struck out on grounds of omission of the requisite bundle of documents; and if the answer is in the negative, whether the respondent proved her case to the required standard.
20. From the record, upon dismissal of her suit at the Chief Magistrate's Court at Nairobi, respondent appealed to the High Court where Onyancha, J. found that some pages of the trial court's proceedings were missing. In the interests of justice and fairness, the learned Judge set aside the lower court judgment and ordered a retrial of the suit before the Industrial Court (now the Employment and Labour Relations Court).
21. This being the 1st appeal, this Court's duty is well established in the case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* [1968] EA 123 where it was stated:

“An appeal to this court from a trial by the High Court is by way of a re-trial 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.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan*[1955]22 EACA 270”
22. Having retracted its contention that it had never employed the respondent, it is now common ground that the respondent was employed by the appellant. What is in contention is whether she was entitled to the reliefs sought. It was the appellant's submission that the respondent was fully compensated



upon her resignation while the respondent's contention was that her terminal dues were not paid. It is notable that while the respondent testified and called one witness in support of her case, the appellant did not call any witness or controvert the respondent's claim.

23. Whereas the appellant contended that no evidence of the terms of employment, salary paid or payment of allowances and special damages was adduced, the respondent sought to have the appeal struck out for failure to meet the requirements of rule 87 of the *Court of Appeal Rules, 2010* (now rule 89 of this Court's Rules) which provides as follows:

“89. (1) For the purposes of an appeal from a decision of a superior court in exercise of its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents—

- (a) an index of the documents in the record with the numbers of the pages at which they appear;
- (b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service as required by rule 79, that respondent's last known address and proof of service on him or her of the notice of appeal;
- (c) the pleadings;
- (d) the trial judge's notes of the hearing;
- (e) the transcript of any shorthand notes taken at the trial;
- (f) the affidavits read and documents put in evidence at the hearing or, if such documents are not in the English language, certified translations thereof;
- (g) the judgment or order;
- (h) the certified decree or order;
- (i) the order, if any, giving leave to appeal;
- (j) the notice of appeal; and
- (k) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant:

Provided that the copies referred to in paragraphs (d), (e) and

- (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal.”

23. We note that no formal application was made seeking to strike out the record of appeal and that no further explanation was given or elaboration made as to how the appeal failed to meet the mandated requirement of the law.



24. In the case of *Peter Obwogo O & 2 others v HO Suing as Next Friend of PO (Minor) & another* [2017] eKLR this court held thus:

“The omission to include a certified decree can be cured by the filing of a supplementary record which act will not occasion any undue prejudice to the respondents. Any prejudice likely to be suffered can be compensated by an award of costs.”

25. In *Intercounties Importers and Exporters v Teleposta Pension Scheme Registered Trustees & 5 others* [2021] KECA 44 (KLR) this court relied on the decision in *Deepak Chamanlal Kamani & Another v Kenya Anti-Corruption Commission and 3 Others*, Civil Appeal (Application) No. 152 of 2009 (unreported) where the Court pronounced itself as follows:

“We think that in the circumstances of this appeal, striking it out would not facilitate the just, expeditious, proportionate and affordable resolution of the appeal. There is an alternative available and while we refuse to strike out the appeal as requested in the motion, we order, under rule 89(3) of the Court’s rules, the 1st respondent to file and serve upon the applicants a supplementary record of appeal containing the notes of the two Judges left out in the record of appeal.”

In the circumstances of this case, we find that the appeal as filed is competent.

26. There is no dispute that the respondent was employed as a security guard by the appellant between 31st August, 1997 and 15th August, 2004 when she resigned.

27. Regulation 2 of the Order identifies the employees to whom the Order applies in the following terms;

“This Order shall apply to all persons employed directly or indirectly by an undertaking or part of an undertaking which is involved in the carrying on of any of the following activities-

- a) private investigations or security consultancy,
- b) guarding of industrial plants, banks, warehouses, shops, private homes or any other property or establishment against theft, illegal entry or fire; and
- c) escort of money or other valuable property.” [Emphasis supplied].

28. The question that then begs to be answered is whether the respondent was entitled to the remedies sought under the Order and awarded by the trial court.

29. The respondent in her plaint claimed the sum of Kshs.552,564.10 as her terminal dues upon resignation as outlined in paragraph 2 of this judgment.

30. It is notable that the appellant did not controvert the amounts claimed by the respondent. Section 10(7) of the Employment Act, 2007 provides as follows:

“(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

31. Under the Regulation of Wages (Protective Security Services) Order 1998, the respondent was entitled to 15% of the basic pay as house rent allowance. The basic pay under the Order is Kshs 4,335.00 while the respondent was paid a salary of Kshs 4,500.00 The respondent claimed to have worked for the



appellant for 6 years and 11 months. From the record, no evidence was adduced to controvert this claim. In the circumstances, we find that the respondent was entitled to a house allowance as claimed.

32. Regarding the claim for overtime of Kshs 315,792.00, the respondent claimed that she worked for 6 days a week from 6am to 6pm for 6 years without a break. The respondent also claimed for Public Holidays worked in the sum of Kshs 27,495.60. She relied on Regulation 9 of the Order in support of these claims. It is notable that the appellant did not controvert these claims. We therefore find that the learned Judge did not err when he awarded the respondent the amounts claimed as overtime and payment for Public Holidays worked.
33. The respondent claimed payment in lieu of annual leave for the year 2004. The respondent worked for 6 months and 18 days having issued her resignation notice in July, 2004. Regulation 10 of the Order provides:

“ 10. Leave with pay

(1) An employee shall be entitled to twenty-six working days’ leave with full pay after each period of twelve months’ consecutive service. (2) Where an employment is terminated before the completion of any twelve months leave earning period, the employee shall be entitled to three days’ leave with full pay in each completed month of service.”

34. From the record, no evidence was adduced to controvert this claim. In the circumstances, we find that the learned Judge did not err in awarding the amounts claimed.
35. One of the benefits conferred on a person covered by the Order is payment of gratuity, which is provided for by Regulation 17 of the Order as follows in pertinent part:

“ 17. Gratuity

(1)After five years’ service with an employer, the employee shall be entitled to eighteen days’ pay for every completed year of service by way of gratuity based on the employee’s wage at the time of termination of service. (2) An employee who is summarily dismissed for lawful cause or who terminates his services for any reason other than certified ill-health or retirement age shall not be entitled to a gratuity: Provided that— (a) in the event of a dispute with regard to termination of services on account of ill-health, the decision of an independent qualified medical practitioner on such a dispute shall prevail; and (b) the normal retirement age shall be fifty-five years.”

34. Under regulation 17 of the Order, the ill-health of the employee has to be certified by an independent qualified medical practitioner. The respondent did not adduce any evidence that her resignation arose from certified ill-health. See: *Fidelis Mwanyumba v Total Security Surveillance* (supra).
35. The respondent was a member of the NSSF and produced her NSSF card as proof that she was employed by the appellant. It was the appellant’s contention that in view of the respondent’s membership to NSSF she was not entitled to a service pay or gratuity. Section 35(5) of the Employment Act provides as follows:

“ 35. Termination notice

(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—  
(a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;



(b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or

(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

(2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.

(3) If an employee who receives notice of termination is not able to understand the notice, the employer shall ensure that the notice is explained orally to the employee in a language the employee understands.

(4) Nothing in this section affects the right—

(a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or

(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognized by law.

(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. (6) This section shall not apply where an employee is a member of—

(a) a registered pension or provident fund scheme under the Retirement Benefits Act;

(b) a gratuity or service pay scheme established under a collective agreement;

(c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

(d) the National Social Security Fund.”

Section 35(6) of the Employment Act excludes the application of \*Section 35 in inter alia cases where the employee is a member of the NSSF.

35. In the circumstances, we find that the respondent was not entitled to service pay as claimed. With respect, we find that learned Judge erred in awarding service pay.

36. On the amount claimed as uniform refund, the respondent claimed that she bought uniform every year and was entitled to a refund of Kshs. 1,200.00. The appellant did not controvert this claim. As stated by the persuasive case of the ELRC (Linnet Ndolo, J.) in *Peter Kimeu Mose and 13 Others v Mang Hotel and another* [2015] eKLR:

“Where an employee is required to put on uniform while at work, the employer must provide the uniform at its own cost. To require an employee to buy their own uniform amounts to an unfair labour practice which cannot be cured by the employee’s acquiescence.”

37. Further, Regulation 21 of the Order mandates employers to provide uniform to an employee and for an employee to return the same on termination. We therefore find that the learned Judge did not err in awarding Kshs.1,200.00 being uniform refund as claimed.



38. From the totality of the evidence, the appeal partly succeeds. In the final analysis, we find that the respondent is entitled to payment as follows:

S No	Item	Amount
a)	18 days worked in July 2004	2,700.00
b)	Payment in lieu of annual leave in 2004	3,600.00
c)	Refund of uniform deposit	1,200.00
d)	House allowance for 6 years 11 months	56,025.00
e)	Payment for public holidays worked 66 days	27,495.60
f)	Overtime worked 4 hours per day for 6 years	315,792.00
	Total	406,812.60
	Less monies received	18,500.00
	Total payable	388,312.60

39. The amount due is payable with interest at court rates from date of filing suit until payment in full.

40. Each party shall bear their own costs of the appeal.

41. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023**

**K. M'INOTI**

**JUDGE OF APPEAL**

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**F. SICHALE**

**JUDGE OF APPEAL**

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**JAMILA MOHAMMED**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

