



REPUBLIC OF KENYA



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**Kariuki v Mars Security Guards Limited (Civil Appeal E090 of 2021)
[2025] KEELRC 94 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 94 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E090 OF 2021
K OCHARO, J
JANUARY 23, 2025**

BETWEEN

SAMUEL KARIUKI APPELLANT

AND

MARS SECURITY GUARDS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Appellant, Samuel Kariuki, initiated the appeal herein challenging the Learned trial Magistrate's Judgment in the above-mentioned suit on the following grounds: -
 - I. That the learned magistrate erred in law and in fact in finding that the separation between the Appellant and the Respondent was by mutual consent and not through the Respondent's unfair termination of the Appellant's employment.
 - II. That the learned magistrate erred in law and fact in failing to consider and make a finding on the unlawful withholding of the Appellant's Academic Certificate (Kenya Certificate of Secondary Education) by the Respondent.
 - III. That the learned magistrate erred in law and fact by failing to make a determination on all the Appellant's claims, on the basis that she had not found a case of unfair, unlawful or wrongful termination of his employment.
 - IV. That the learned magistrate erred in law and fact in failing to award the Appellant his statutory benefits/entitlements.
 - V. That the learned magistrate erred in law and fact by failing to award the Appellant House Allowance on grounds that the same was not provided for in the Employment Contract



despite making a finding that he was not paid House Allowance during the pendency of his employment.

- VI. That the learned magistrate erred in law and fact by failing to award the Appellant compensation for overtime worked despite the Appellant proving that he worked overtime without compensation.
 - VII. That the learned magistrate erred in law and fact by failing to award the Appellant the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually underpaid despite proof of the underpayments.
 - VIII. That the learned magistrate erred in law and in fact by failing to find that the Respondent being the custodian of the employment records failed to prove that the Appellant was compensated over the public holidays worked and as a consequence declined to make an award for holiday pay.
 - IX. That the learned magistrate erred in law and fact by upholding an illegal contract which is in contravention of the provisions of the labour laws.
 - X. That the learned magistrate erred in law and in fact by finding that statutory and terminal benefits are tied to the nature of separation between an employer and an employee.
 - XI. That the learned Magistrate erred in law and fact in disregarding the Appellant's Memorandum of Claim and submissions by the Appellant.
 - XII. That the learned magistrate erred in law and fact by closing her mind to the Appellant's case, evidence and submissions thereby arriving at a wrong and unjust decision.
 - XIII. That the learned trial magistrate erred in law and fact in failing to appreciate the principles applicable in the circumstance therefore arriving at an erroneous finding.
 - XIV. That in all the circumstances of the case, the learned.
2. The Appellant prays for the following orders:
- a. The appeal be allowed.
 - b. The impugned parts of the Judgment and Decree of the Learned Magistrate be set aside;
 - c. This Court be pleased to substitute the impugned parts of the Judgment of the Learned Magistrate with orders:
 - I. A declaration that the termination of the Appellant's employment by the Respondent was unfair, unlawful and wrongful for want of both procedural fairness and substantive justification.
 - II. A declaration that the Respondent's continued withholding of the Appellant's KCSE certificate is unlawful.
 - III. This Court orders the Respondent to release the Appellant's KCSE certificate.
 - IV. A declaration that the Appellant was entitled to house allowance as provisions of the employment contract could not waive statutory benefit/entitlement;
 - V. This Honourable Court awards the Appellant the total pending house allowances of Kshs. 70,680/- as prayed at paragraphs 26(i) of the Memorandum of Claim.



- VI. A declaration that compensation of the overtime worked cannot be waived by provisions of the Agreement which required the Appellant to work overtime but prohibited compensation of the same;
- VII. This Court awards the Appellant the total overtime compensation worked of Kshs. 304,668.7/- as prayed in paragraphs 26 (ii) of the Memorandum of Claim.
- VIII. A declaration that the Respondent failed to prove compensation for the public holidays worked despite being required by law to keep employment records of the Appellant;
- IX. This Court awards the Appellant the total compensation for public holidays worked of Kshs. 29,408.4/-as prayed in paragraphs 26 (iii) of the Memorandum of Claim;
- X. This Court awards the Appellant the total pending payment in lieu of leave days not taken of Kshs. 87,787.85/-as prayed in paragraphs 26 (iv) of the Memorandum of Claim.
- XI. A declaration that the Respondent contravened Section 48 1 (a) of the *Labour Institutions Act* and the various Regulations of Wages (General) (Amendment) Order applicable during the pendency of the Appellant's employment in grossly underpaying the Appellant.
- XII. This Honourable Court awards the Appellant the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid being Kshs. 287,840.38/-as prayed in paragraphs 26 (v) of the Memorandum of Claim.
- XIII. This Court awards the Appellant compensation for wrongful termination of his employment of Kshs. 209,760/-equivalent of 12 months gross salary as prayed at paragraph 26(vii) of the Memorandum of Claim;
- XIV. This Court awards the Appellant payment in lieu of notice equivalent to one month's salary (Kshs. 17,480/) as prayed in paragraph 26 (vi) of the Amended Memorandum of Claim.
- XV. This Court awards the costs of this appeal to the Appellant.

Appellant's case before the lower court

3. By Memorandum of Claim dated 9th September 2019, the Appellant sued the Respondent claiming that the latter unlawfully, unfairly, and wrongfully terminated his employment, and consequentially sought the following reliefs:-
 - i. Compensation House allowance 70,680/-
 - ii. Compensation for Overtime 304,668.7/-
 - iii. Compensation for Holidays worked
but not paid for 29,408.4/
 - iv. Compensation for earned but
unutilized leave days, 87,787.85/-
 - v. Salary underpayment 378,840.38/-
 - vi. Notice pay in lieu of termination
notice (1 month's pay) Kshs. 17,480/-



- vii. Damages for unlawful termination (12 months' pay) i.e. Salary at dismissal=Damages 17,480 x 12 months=Kshs.209,760/-
 - viii. Interest on the total sum awarded
 - ix. Certificate of Service.
 - x. Costs of the cause.
 - xi. An order directing the Respondent to produce the Claimant's Original KCSE Certificate or foot the expenses to facilitate the Claimant getting a new certificate from the responsible authority.
4. The Appellant stated that he was employed by the Respondent on the 1st day of July 2016, as a security guard. The Respondent informed him that it was their policy that employees should leave their original Kenya Certificate of Secondary Education (KCSE) certificate with it before being allowed to start working. The Appellant therefore furnished the Respondent with the said original certificate. Thereafter, the Appellant worked diligently for the Respondent.
 5. On 22nd January 2019, the Appellant was given leave to attend a funeral ceremony of his kin. While still on leave, the Respondent informed him that his leave period had been extended to include pending leave days for 2016-2019, and instructed to return to work on 4th February 2019. However, when he resumed his duties, he was informed that he should make a fresh application for employment. He prepared an application and requested the Respondent's management for his original KCSE certificate. The Appellant was then informed that his certificate could not be traced.
 6. Both the Claimant and Respondent reported the loss of the certificate to the Kenya Private Security Union, with the Respondent stating that the certificate was not left in their possession.
 7. On the 18th day of February 2019 the Respondent's manager Jackson Orondo informed the Appellant that he could not be accepted to work for the Respondent if his KCSE certificate was not on his employment file, hence verbally and/or constructively terminating the employment contract. The Appellant was therefore unfairly terminated from employment.

Respondent's case

8. The Respondent resisted the Appellant's claim through an answer to the Memorandum of Claim dated 13th January 2019.
9. The Respondent averred that it employed the Appellant on 1st July 2016 as a security guard on short-term contracts that would be renewed at the discretion of the Respondent from time to time based on its work needs. Further, it was not a condition that its new employees deposit with it their original Kenya Certificate of Secondary Education certificate.
10. The Appellant applied for his annual leave which began on 21/1/2019 and was to report back to work on 21/3/2019. However, before the date of resumption from leave, the Appellant reported the Respondent to the Ministry of Labour vide a letter dated 01/03/2019 alleging that the latter had unfairly terminated his employment on 21/01/2019.
11. Further, on 22/03/2019, the Respondent received a letter from the Kenya National Private Security Workers Union which alleged that the Respondent had terminated the Appellant's employment on 03/02/2019.



12. On 27/03/2019, the Respondent met with the Appellant and the union's officials where it was established that the Appellant's employment was not terminated. However, the Appellant informed the Respondent that he did not want to continue working for the Respondent.
13. The Respondent asserted that the Appellant's employment was not terminated as he alleged.

Analysis and Determination.

14. I have carefully considered the material that was placed before the Learned trial Magistrate, and the submissions by the parties' respective Counsel in this appeal, and hold that the appeal turns on the following principal grounds;
 - I. Whether the Learned trial Magistrate erred in law and fact when she improperly considered the reliefs that were sought in the Appellant's pleadings.
 - II. Whether the Learned trial Magistrate erred in law and fact in her finding as regards how the separation between the Appellant and the Respondent occurred.
 - III. Whether the Learned trial Magistrate erred in law and fact in awarding the reliefs as she did to the Appellant.
15. Before I delve further into considering each of these identified reliefs its pertinent to point out that scope of this Court's jurisdiction as a first Appellate Court is clearly delineated. It must consider the evidence, evaluate it itself, and draw its own conclusions but without losing sight of the fact that it neither saw or heard the witnesses and make due allowance in this respect. See, *Selle and Another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123.

Issue 1

16. The Appellant's Counsel submitted, and rightly so in my view, that the Learned trial Magistrate in her determination improperly approached the Appellant's reliefs sought. Her determination proceeded inter alia on the premise that all the reliefs were wholly tied to his claim for unfair termination. She stated: -

“Had the Claimant proved that he was unfairly and wrongfully terminated, the following issues could have been by determination on

17. This statement ignores a very vital point, that there are reliefs, such as underpayments, unpaid leave, compensation for hours worked during public holidays but not paid for, and compensation for unpaid house allowance, inter alia, which can be claimed independently of a claim for unfair termination and associated remedies. In my view, the erroneous statement flowed from the failure of the Learned Trial Magistrate to critically analyse the legal foundation on which the various reliefs were sought.

Issue 2

18. The parties took diametrically opposite positions as regards how the separation between the Appellant and the Respondent took place in their employee-employer relationship. The Appellant contended that his employment was unfairly terminated by the Respondent orally. The Respondent on the other hand claimed that the relationship came to an end when the Appellant categorically expressed his position that he was unwilling to continue working for it, therefore, voluntarily resigning from his employment.



19. Section 47[5] of the *Employment Act* provides;

“For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

20. Inarguably, the termination referred to in the provision can only be one by the employer by their action [for instance, summary dismissal, or declaration of redundancy] or their conduct [constructive dismissal]. It cannot be one initiation of the employee, for instance by voluntary resignation, or desertion of duty.

21. Addressing a situation like there was in the instant lower court matter, where there was no convergence as regards whether or not the employer terminated the employee’s employment, this Court in the case of *Rebecca N. Nyangolo v Prashant Raval* [Cause 2453 of 2016] KEELRC 898[KLR] set out the guiding principle for the determination whether the employer terminated the employment, thus:

“54. The common denominator in all forms of dismissal is that all of them are ultimately caused by the employer. Dismissal, by its definition, is not initiated by the employee, nor is it something which merely happens. -*Schmahnn v Concept Communications Natal [pty]Ltd* [1997] 8BLLR 1092 [LC].

56. This Court is faced with a situation where parties have taken a position which is a world apart, on an issue whose determination is vital to the disposal of this matter. I am therefore called upon to believe one party and disbelieve the other, on the respective accounts on the issue. In this situation, I am not hapless, the pleadings, the totality of the evidence placed before the Court, the consistency in the contents of the pleadings with the evidence adduced thereon, the consistency of the oral testimony in court with the factual contents of the parties’ respective witness statements, and the demeanour of the parties, come in handy as a gauge for the position the Court should take.”

22. It is important to point out that where the employee fails to establish prima facie that the termination was by the employer and that the same was procedurally and or substantively unfair, their case will fall at that hurdle. See, *Kennedy Maina Mirera v Barclays Bank of Kenya Limited* [2018] eKLR, cited by Counsel for the Respondent.

23. I have carefully considered the material that was placed before the Learned Trial Magistrate on this aspect in toto. I note the minutes of the meeting that was held on 27th March 2019, between the Respondent’s representatives, the Appellant, and the representatives of the Union, and the indication therein that the Appellant expressed he wasn’t interested to continue working for the Respondent.

24. In his evidence under cross-examination, before the Learned Trial Magistrate, the Claimant admitted that he signed the minutes and that he has never challenged the contents of the same. By reason of this, I am convinced, and agree with the Learned Trial Magistrate’s holding, that the employer-employee relationship between the Respondent and the Appellant came to an end at the initiation of the latter. He orally resigned.

25. The Appellant’s Counsel expended time and energy submitting on the aspect of desertion and how unfair the termination of the Appellant’s employment was on account of desertion. With great respect, the energy was mistargeted. The Respondent’s defence wasn’t that the Appellant deserted duty and



consequently, a fair termination ensued, but that the termination of the contract of employment was at the initiation of the Appellant.

Issue 3

26. The Appellant lamented that the Learned Trial Magistrate, without due regard to the provisions of Section 31 of the *Employment Act*, 2007, declined to grant him compensation for the cumulative house allowance [KShs. 70,800] that wasn't paid to him throughout the time he served the Respondent. The *Employment Act*, of 2007, came in with statutory rights for employees, and correlative obligations on the employer. Among the rights, is the right to reasonable accommodation by the employer or reasonable house allowance to enable them secure accommodation.
27. The Respondent contended and its Counsel submitted that the Appellant's salary was consolidated. Further, the Appellant didn't disapprove this by way of the production of a pay slip[s] in evidence, that salary was not consolidated. Keenly considering the provisions of Sections 10 and 74 of the *Employment Act*, one cannot be off the mark to conclude that the legal duty to prove that the salary was consolidated lay on the Respondent. It is with this in mind that I respectively disagree with the Respondent's submissions, and the decision cited in support thereof.
28. I have carefully considered the agreements that were tendered in evidence. They do not specifically speak to the fact that the salary was consolidated. Other than generally stating that she could decline the house allowance claim because it wasn't proved, the Learned Trial Magistrate didn't set out how her finding could sit well with the provisions of Section 31 of the *Employment Act*, the employer's duty under Section 10 [7] of the Employment in a dispute where there is controversy over a term of an employment contract, Section 74 of the Act, on the employer's duty to keep employment records, and the effect of the absence of a specific term in an employment contract speaking to an alleged fact that the employee's salary was consolidated, as was espoused in the Court of Appeal case in *Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu* [2019] eKLR.
29. I am persuaded that the Respondent failed to prove that the salary it was paying the Appellant was consolidated, and the Learned Trial Magistrate erred in holding that the Appellant was not entitled to the relief under the head, unpaid house allowance.
30. This Court has said time without number that for a claim for overtime and compensation for holidays worked but not paid for to succeed, to succeed in his or her claim for overtime compensation, there must be sufficient specificity in pleadings as regards them and evidence geared towards proving the same. It won't suffice, therefore, for the Claimant to just through figures to Court as the Appellant did, and hope to get a favourable judgment. The Learned Trial Magistrate cannot be faulted in her finding that the Appellant didn't prove the claim. This was not proved under the heads, overtime and unpaid holidays.
31. In light of the Appellant's evidence that he used to encash his leave days, the Learned Magistrate's finding that he wasn't therefore entitled to the relief, compensation for earned but unutilized leave days, cannot be faulted.
32. Under Section 48 of the *Labour Institutions Act*, the employee to whom Wage Orders apply, can rightfully sue for any sum of money reflecting the total amount, the difference between what he or she was actually paid, and what he or she could have been paid if his or her wages were paid in conformity with the relevant Wage Order at the material times. Since minimum wages are declared, and change, from time to time, any pleadings and evidence regarding the underpayments must be of sufficient detail. The Appellant's Memorandum of Claim and his evidence on the relief were deficient in detail. The trial Court was right in declining to grant the relief.



33. In my view, there wasn't sufficient evidence to prove that it was a condition precedent for the Appellant to deposit his original certificate and that indeed he did, with the Respondent, before taking up the employment.
34. Having correctly held that the Appellant's employment was not terminated by the Respondent, the Learned Trial Magistrate was not at fault in finding that the Appellant wasn't entitled to, notice pay, and a compensatory relief under Section 49[1][c] of the *Employment Act*. The two reliefs were tied to the claim for unfair termination.
35. In the upshot, the Appellant's appeal hereby partially succeeds. The Learned Trial Magistrate's finding that the Appellant wasn't entitled to compensation for unpaid house allowance is set aside. In place thereof, an order allowing the relief is made. I award him KShs. 70,800.
36. The Appellant is also awarded the costs for the lower court suit, and this appeal, which are to be computed on this figure awarded.
37. Interest on the sum at court rates from the date of filing of the suit in the lower court until full payment.

READ, SIGNED AND DELIVERED THIS 23RD DAY OF JANUARY 2025.

OCHARO KEBIRA

JUDGE

In the Presence of:-

Mr. Ondigi for the Appellant.

Mr. Mutei for the Respondent.

