



REPUBLIC OF KENYA



Makokha & another v Buckram Security Limited (Employment and Labour Relations Cause E584 of 2022) [2025] KEELRC 66 (KLR) (21 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 66 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E584 OF 2022**

**HS WASILWA, J
JANUARY 21, 2025**

BETWEEN

SEBASTIAN MUNOKA MAKOKHA 1ST CLAIMANT

SAMMY MUSEMBI 2ND CLAIMANT

AND

BUCKRAM SECURITY LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit through a Statement of Claim dated 13th August 2022, alleging that the Respondent unfairly terminated their employment without due process, violated their rights to fair administrative action and fair labour practices, and failed to pay their terminal dues. The Claimants were employed as security guards by the Respondent, Buckram Security Ltd, from October 2021 to May 2022, earning a monthly salary of Kshs. 9,000. They contend that the Respondent failed to pay their monthly wages for four months, even after intervention by a labour officer, and subjected them to poor working conditions, including 24-hour shifts without compensation.
2. The Claimant avers that their employment was terminated verbally and without notice or valid reasons, contrary to Section 35, 41, 43, and 45 of the *Employment Act*, Article 47 of *the Constitution*, Section 4 of the *Fair Administrative Action Act*, and ILO *Convention No. 158 of 1982*. They further allege that the Respondent violated their labour rights by underpaying them in breach of the Regulation of Wages (General) (Amendment) 2018, failing to provide house allowance as per Section 31 of the *Employment Act*, and neglecting to compensate them for overtime, holidays, and rest days as stipulated in the Regulation of Wages (Protective Security Services) Order, 1998. They were also denied annual leave contrary to Section 28 of the *Employment Act*.
3. Despite demand and notice of intention to sue, the Respondent has failed to meet their legal obligations. The Claimant seeks reliefs including one month's salary in lieu of notice (Kshs. 19,593



- and Kshs. 21,796.5), 12 months' salary for wrongful termination (Kshs. 195,930 and Kshs. 217,965), underpayment compensation (Kshs. 105,930 and Kshs. 127,960), overtime pay (Kshs. 72,780 and Kshs. 81,930), rest day compensation (Kshs. 26,124 and Kshs. 29,062), holiday pay (Kshs. 7,184.1 and Kshs. 7,992.05), damages (Kshs. 150,000 each), unpaid leave (Kshs. 13,715.1 and Kshs. 15,257.55), house allowance (Kshs. 60,210 and Kshs. 66,545.5), salary arrears (Kshs. 54,000 each), service pay (15 days' pay for every year of service), and issuance of a certificate of service (Kshs. 9,796.5 and Kshs. 108,982.5). They also seek interest at court rates and the costs of the suit.
4. This claim invokes *the Constitution* of Kenya, the *Employment Act*, 2007, the *Labour Relations Act*, the *Labour Institutions Act*, the *Fair Administrative Action Act*, the *Employment and Labour Relations Court Act*, 2011, the Employment and Labour Relations Court (Procedure) Rules, 2016, the Regulation of Wages (Protective Security Services) Order, 1998, the Regulation of Wages (General) (Amendment) 2018, and relevant provisions of ILO Conventions. The Claimant has provided a schedule of documents, including Mpesa statements, demand letters, witness statements, and a list of witnesses and documents to support their claim. The court has jurisdiction to hear and determine this matter.
 5. The Claimants swore a Verifying Affidavit of even date, affirming that they are the Claimants in the matter and are fully conversant with the issues therein, thus competent to swear the affidavit. They stated that they have read and understood the contents of the Statement of Claim and verified the same as true and correct. They further affirmed that the information contained in the affidavit is true to the best of their knowledge, information, and belief.

Claimants' Written Submissions

6. The Claimants filed written submissions dated 13th August 2022 asserting that their termination from employment was unfair and unlawful. They contended that under Section 2 of the *Employment Act*, they were employees of the Respondent, engaged in a contract of service. While the Respondent claimed they were casual employees, the Claimants maintained they were permanently employed, evidenced by an agreement with the Respondent, who failed to provide any employment records as required under Sections 8 and 9 of the *Employment Act*. The Claimants worked continuously for over six months, exceeding the three-month threshold stipulated in Section 9(1) of the Act, which necessitates written contracts of service, a responsibility of the employer as provided under Section 9(2).
7. The Claimants argued that the Respondent violated procedural requirements for termination under Section 41(1) of the *Employment Act*, which mandates an employer to explain the reasons for termination in the presence of a representative chosen by the employee. They relied on precedents such as *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR, which emphasized the mandatory nature of these provisions and highlighted that failure to follow due process renders termination procedurally unfair. Additionally, they cited *David Gichana Omuya v Mombasa Maize Millers Limited* (2014) eKLR, which reiterated the significance of procedural fairness.
8. The Claimants submitted that no evidence was presented by the Respondent to support allegations of absconding duty or misconduct. They were not issued show cause letters, warnings, or any form of written communication, nor were they subjected to any disciplinary hearing as required under the principles of natural justice and procedural fairness. They referenced cases such as *Gachuhi v Malster International* (Cause E406 of 2020) [2022] KEELRC 3822 (KLR) and *CMC Aviation Limited v Mohammed Noor* [2015] eKLR, which emphasized the importance of adherence to statutory procedures and the right to a fair hearing in employment termination.



9. The Claimants further argued that under Sections 43, 45(2), and 47(5) of the *Employment Act*, the burden of proof lies with the employer to justify termination. They emphasized that the Respondent failed to meet this burden, making the termination unfair within the meaning of Section 43. They relied on *British Leyland UK Ltd v Swift* (1981) IRLR 91, which outlined the test of reasonableness for termination, and *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union* [2017] eKLR, which highlighted the need for valid and justifiable reasons.
10. The Claimants asserted that the procedural flaws in their termination rendered the process illegal and sought relief for unfair termination, including compensation for procedural unfairness, as established in *Freddy Kipkorir Lang'at v Co-operative University of Kenya* [2021] eKLR. They contended that the Respondent's failure to follow the requirements of Section 41(1) violated their right to fair labour practices, as enshrined in the *Employment Act* and judicial precedent.
11. The Claimants further submit that their termination was illegal and unlawful, as they were dismissed based on unproven allegations of misbehavior, absconding duty, and insulting customers. They assert that Section 44(4) of the *Employment Act*, 2007 requires an employee to be given an opportunity to dispute accusations, and Section 44(4)(g) provides that dismissal may only be justified if the employee commits or is reasonably suspected of committing a criminal offense to the employer's detriment. Additionally, Section 45 of the Act prohibits unfair termination and requires employers to prove the validity and fairness of the reasons for termination and ensure fair procedure. Section 47(5) of the Act places the burden of proving unfair termination on the employee while requiring the employer to justify the grounds for dismissal.
12. The Claimants contend that the Respondent failed to prove any valid reason for their termination or demonstrate substantive and procedural fairness as required by law. Citing the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, they argue that termination must meet both substantive justification and procedural fairness. They also refer to *Naima Khamis v Oxford University Press (EA) Limited* [2017] eKLR, which emphasizes the necessity of valid reasons and adherence to fair procedures for lawful termination. The Claimants allege that their termination violated Articles 41 and 47 of *the Constitution*, which guarantee fair labor practices and administrative actions. They state they were not subjected to a disciplinary hearing or accorded an opportunity to defend themselves, contrary to Sections 43, 45(2), and 45(4)(b) of the *Employment Act*.
13. The Claimants seek maximum compensation of 12 months' salary under Section 49 of the *Employment Act*, amounting to Kshs. 195,930 for the 1st Claimant and Kshs. 217,965 for the 2nd Claimant, as their termination was unlawful. They further claim unpaid overtime for working 84 hours weekly, contrary to the 46-hour limit under the Regulation of Wages (Agricultural) Order, which provides for overtime compensation. They calculate their entitlement as Kshs. 72,780 and Kshs. 81,930, respectively. They also claim payment for rest days, holidays, and annual leave not granted during their employment, amounting to Kshs. 26,124 and Kshs. 29,062 for rest days, Kshs. 7,184.1 and Kshs. 7,992.05 for holidays, and Kshs. 13,715.1 and Kshs. 15,257.55 for unpaid leave, respectively.
14. The Claimants allege underpayment as they were paid Kshs. 9,000 monthly, instead of the minimum wage of Kshs. 13,572.90 and Kshs. 15,141.95 for Nairobi security guards as per the Regulation of Wages (General) (Amendment) Order, 2018. They calculate the underpayment as Kshs. 105,930 and Kshs. 127,960, respectively. They claim housing allowance under Section 31 of the *Employment Act* and Paragraph 5 of the General Order, amounting to Kshs. 60,210 and Kshs. 66,545.5, respectively, as they were not provided housing or housing allowance.
15. The Claimants argue they are entitled to service pay under Section 35(5) of the *Employment Act* since the Respondent failed to show evidence of their subscription to NSSF or NHIF, amounting to Kshs.



9,796.5 and Kshs. 108,982.5, respectively. They also claim unpaid salaries of Kshs. 54,000 each for four months, one month's salary in lieu of notice under Section 36 of the *Employment Act* amounting to Kshs. 19,593 and Kshs. 21,796.5, respectively, and damages of Kshs. 150,000 each for the hardships caused by unfair dismissal. They further seek a certificate of service under Section 51 of the *Employment Act*, interest on all amounts at court rates, and costs of the claim.

Respondent's Case

16. The Respondent filed a Statement of Response dated 23rd June 2023, denying all allegations of fact and law in the claim, except where expressly admitted. The Respondent admitted the descriptive contents of paragraph 1 of the claim and confirmed representation by Kurauka & Co. Advocates. The Respondent stated that it is a young company focused on creating employment for jobless Kenyan citizens but claimed that the Claimants had manipulated the company by making unreasonable demands, adversely affecting its growth. The Respondent emphasized that it employs approximately 30 guards, whose livelihoods and those of their 100 dependents would be jeopardized by the Claimants' demands or any exorbitant award granted by the court. The Claimants were described as casual workers engaged for a maximum of three months at a daily rate of Kshs. 300.
17. The Respondent averred that the 1st Claimant was not engaged as a guard but as a casual worker whose duties involved packing and checking receipts and orders in the store, alleging that he impersonated a guard and was never in uniform. The Respondent cited financial constraints due to the COVID-19 pandemic and non-payment by customers as reasons for its inability to meet financial obligations, including the claims made by the Claimants. It was alleged that the Claimants misbehaved and absconded duty on several occasions, leading to the termination of their casual services, which the Respondent argued was fair and justified. The Respondent further alleged that the Claimants were dismissed by its customers due to indiscipline and insulting behavior.
18. The Respondent denied owing the Claimants any money and put them to strict proof of their claims. It argued that the claims were frivolous, lacked merit, were vexatious, and fatally defective, indicating its intention to raise a preliminary objection to have the claims struck out with costs. The Respondent contended that the court lacked jurisdiction to determine the issues raised and that the Claimants had failed to pursue their claims in the proper forum. The Respondent also argued that no proper demand or notice of intention to sue had been served. Apart from the admissions made, the Respondent denied all other allegations in the claim.

Respondent's Written Submission

19. The Respondent filed written submissions dated 30th November 2024 in response to the Claimants' case. The Respondent relies wholly on its pleadings and the testimony of its director, which they opted not to reproduce in the submissions. The Respondent denied the claim of unfair or unlawful dismissal, asserting that neither of the Claimants was dismissed. The 1st Claimant was allegedly rejected by clients due to rudeness and loss of items and declined to be reassigned, instead pursuing a claim for unpaid salary. The 2nd Claimant allegedly absconded from duty under the influence of the 1st Claimant, which the Respondent argued amounted to self-dismissal. The Respondent emphasized that there was no replacement for the 1st Claimant's position after his departure, further asserting that the 2nd Claimant's departure led to the loss of business and unpaid debts.
20. The Respondent stated that at the time of the alleged events, the company was in its early stages, with fewer than ten guards, and claimed the Claimants' misconduct negatively impacted the business, resulting in the loss of other guards and clientele. The Respondent further submitted that economic challenges, including Covid-19-related debts and non-payment by contracting clients, significantly



affected their operations. They argued that imposing penalties would be a heavy burden on a struggling company and counterproductive to the government's efforts to reduce unemployment. The Respondent maintained that they had shown goodwill by committing to clear salary arrears before the Claimants filed their claim, which they considered premature, speculative, and based on unsubstantiated allegations.

21. The Respondent stated that the Claimants were engaged as casual labourers at a daily rate of Kshs. 300, which they had accepted at the time of their engagement. They clarified that one Claimant left earlier than the other, creating a one-month discrepancy in salary arrears. They urged the court to dismiss the claim on the basis that the Claimants failed to prove their case to the required standard as provided under Sections 107, 108, and 109 of the *Evidence Act* (Cap 80). They relied on the principle that the burden of proof lies with the party seeking judgment and cited *Total Kenya Ltd v Joseph Okiem* (HCCC No. 1243 of 199) to support the position that parties to a contract are bound by its terms. The Respondent also referred to *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR, where the Court of Appeal defined a prima facie case and emphasized that there must be material evidence to support such a claim.
22. The Respondent concluded by urging the court to dismiss the Claimants' case with costs, emphasizing that their claims were unsubstantiated and imposing penalties would unfairly burden a small, struggling company.
23. I have examined all the evidence and submissions of the parties herein. The respondents have admitted an employment relationship with the claimants but aver that they employed the claimants on casual basis and that 1st claimant was not a guard but his duties were to pack and check receipts and orders in the store.
24. The respondents did not indicate the period within which this engagement occurred. From the claimant's evidence they aver that the employment was from October 2021 to May 2022 a period of only 7 months.
25. The claimants aver they were never paid their salaries for 4 months but the respondent only casually denied this without any proof of the payments. It is not clear how the employment relationship terminated.
26. In view of the admission by the respondents that they had an employment relationship with the claimant and without any evidence of the manner in which this relationship was terminated, I find that the claimants were unlawfully terminated as stated by themselves.
27. I therefore find for claimants and award each as follows:
 1. 1 months' salary in lieu of notice Kshs 9,000/-
 2. 3 months' salary as compensation for unlawfull termination given the short time of engagement $9,000 \times 3 =$ Kshs 27,000
 3. Payment of 4 months unpaid salary = $4 \times 9,000 =$ Kshs 36,000/-
 4. Underpayment of salaries for the period being paid kshs 9,000/-instead of kshs 13,512.90 and Kshs 15,141.95 for day and night guard duties respectively as the wages regulation of 2018 this equals Kshs 105,930 and Kshs 127,960 for each of the claimants respectively.
 5. I also award house allowance as prayed at Kshs 60,210 and Kshs 66, 545.5 respectively.



Totals

1st claimant = Kshs 238,140/-

2nd claimant= Kshs 266,505.5/-

Each less statutory deductions.

6. The claimants should be issued with a certificate of service.
7. The respondents shall pay costs of this suit plus interest at court rates w.e.f the date of this judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF JANUARY, 2025.

HELLEN WASILWA

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

HELLEN WASILWA

JUDGE

