



REPUBLIC OF KENYA



**Gyto Success Company Limited v Dalu (Appeal E214 of 2024)
[2025] KEELRC 587 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 587 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E214 OF 2024
M MBARÚ, J
FEBRUARY 27, 2025**

BETWEEN

GYTO SUCCESS COMPANY LIMITED APPELLANT

AND

LEONARD SINDI DALU RESPONDENT

*(Being an appeal from the judgment of Hon. J. Nyariki delivered
on 12 September 2024 in Mombasa CMELRC No.E373 of 2023)*

JUDGMENT

1. The appeal arises from the judgment delivered on 12 September 2024 in Mombasa CMELRC No.E737 of 2023. The appellant is seeking that the judgment be set aside with costs.
2. The respondent filed a claim before the trial court and claimed that he was employed as a night guard at Taru railway station from 1 April 2020 to 1 April 2022. He reported to work only to find new security guards from a different company. He made enquiries from the manager George Mwamuye who informed him that there was no more work and should return his uniforms. There was no notice or payment of terminal dues. He claimed that his wage was Ksh.11, 000 per month contrary to the Wage Orders provided for Ksh.15, 141.95. He worked during public holidays without compensation and service pay. His claims are;
 - a. Notice pay Ksh.15,141.95;
 - b. Leave pay for 2 years Ksh.24,459.96;
 - c. Underpayments for 24 months Ksh.99,406.80;
 - d. House allowance for 24 months Ksh.54,510.96;
 - e. Overtime for 4 hours each day for 24 months ksh.181,684.84;



- f. 20 Public holidays Ksh.23,295.20;
 - g. 12 months compensation Ksh.181,703.40;
 - h. Certificate of service;
 - i. Costs of the suit.
3. The appellant admitted that the respondent was employed as a security guard from 1 March 2020 to 31 March 2022, but the claims made were denied. He had a fixed-term contract with an end date of 31 March 2022. The respondent and his colleagues were employed on a two-year term contract to service a project tender No.KRC/SCM/016/2019-2020 a contract for the provisions of security guarding services to the Kenya Railway premises at the coast region. The contract was for two years. Due to the termination of the contract, the employment contracts were not renewed. The respondent utilized his leave days and public holidays. The wage paid was consolidated including house allowance. Statutory dues were remitted. The respondent has failed to clear with the appellant for payment of terminal dues and payment of terminal dues.
4. The learned magistrate heard the parties and in the judgment held that there was unfair termination of employment for lack of valid reasons and fair procedure under Section 45 of the Employment Act. The court held that;
- On reliefs, under Section 49(1) of the Act, I award the claimant prayers sought for under paragraph 17 of the Memorandum of Claim save for underpayment, house allowance which I have ascertained had already been paid, overtime which has not been proved and public holiday allowance.
5. The court awarded the following;
- a. Terminal and contractual dues amounting to Ksh.221,305.31;
 - b. Certificate of Services;
 - c. Costs and interests.
18. Aggrieved, the appeal is that the respondent did not prove his case to justify the awards and contrary to the pleadings filed, the court did not give consideration to the response and failed to account for the principles upon which the provisions of Section 49 of the Employment Act were applied in awarding 12 months compensation.
19. The appellant submitted that the respondent's employment was under a fixed-term contract based on a tender award obtained by the appellant under which he was employed with his colleagues. The contract had a start and end date from 1 March 2010 to 31 March 2022. In the case of Martha A. Achieng v National Water Conservation & Pipeline Corporation [2021] eKLR, the court held that a fixed-term contract is lawful. This is affirmed in Registered Trustees of the Presbyterian Church of East Africa & Another v Ruth Gathoni Ngotho [2017] eKLR. The contract started and lapsed on its terms. No notice or compensation is due.
20. The appellant submitted that section 28 of the Employment Act allows 21 leave days. The respondent claimed 2 years of leave pay but changed this to one year. There is evidence of payment of Ksh.12, 229.98 in leave pay.
21. The respondent submitted that the burden of proving reasons for termination of employment is on the employer as held in Kenya Revenue Authority v Reuwel Waitthaka Gitahi & others [2019] eKLR.



- The respondent discharged his burden of a prima facie case under Section 47(5) of the *Employment Act* as held in *Peter Otabona Ekisa v County Government of Busia* [2017] eKLR.
22. Employment was terminated without notice or reasons. No written contract was issued, as alleged. The respondent denied signing the contract filed. Due process under Section 41 of the *Employment Act* was not adhered to, leading to unfair termination of employment under Section 45 of the Act. The notice pay and compensation were awarded correctly.
 23. The trial court awarded terminal dues at ksh.221, 305.31 on the basis that no notice was issued and compensation was not given. The fact that the contract tender ended was not brought to his attention to justify termination of employment, as held in *Gilbert Isandula Shikalo v Bernard Njoroge t/a Creative Metro Services* [2020] eKLR.
 24. The respondent submitted that he was entitled to overtime pay for working an extra 4 hours each day from 6 pm to 6 am for 2 years. An employer is not allowed to contract an employee under the minimum wage, as held in *Vipingo Ridge Limited v Swalehe Ngonge Mpitta* [2022] eKLR. For overtime, this should have been analyzed and awarded. A leave allowance was not taken for 2022; there was no payment for the house allowance, and the appeal is without merit.

Determination

25. As a first appeal, this court has a primary role in re-evaluating, re-assessing, and re-analyzing the extracts on the record and making its conclusion.
26. The appellant asserts that the parties were under a fixed-term contract with a start and end date. The term contract was founded on the tender award, allowing the appellant to provide security services. The tender ended, leading to the non-renewal of the fixed-term contract, which lapsed on its terms.
27. The respondent's case is that he had no contract, his employment was terminated unfairly, and he was not paid terminal dues.
28. In filing the response, the appellant attached the fixed-term contract issued to the respondent. This record was not challenged. The respondent denied being issued with the employment contract. Still, upon cross-examination and put to task, he admitted he applied for employment with the appellant and signed the filed employment contract.
29. The contract dated 27 January 2020 is signed by the respondent for the security guard position from 1 March 2020 to 31 March 2022 at a wage of Ksh.12, 000 per month.
30. A fixed-term contract is lawful and legitimate under Section 10(3) of the *Employment Act*. It is self-executing with a start and end date. The employer has no duty to issue notice of termination or reasons thereof.
31. *Wambugi v Board of Management Afya Yetu Initiative* [2024] KECA 1557 (KLR) held that a fixed-term contract carries no rights, obligations, or expectations beyond the expiry date. This position is reiterated in the case of *Article 19; Global Campaign for Free Expression v Waswa* [2024] KECA 139 (KLR), that a fixed term contract lapses by effluxion of time. See *Odhiambo & 3 others v County Government of Nairobi City County & 114 others* [2024] KECA 662 (KLR).
32. In this case, the fixed-term contract was admitted; it started and lapsed on its terms. No notice was due, and there were no reasons to justify the award of notice pay or compensation.
33. The claims made for leave pay, underpayment, house allowance, and overtime, including work during public holidays, should have been analyzed on the merits.



34. The respondent took 21 leave days in an application dated 25 January 2022. This record was filed with the response and was not challenged.
35. On underpayment, the fixed-term contract provided for a wage of Ksh.12, 000 per month inclusive of a house allowance. Although Section 31(2) of the Employment Act allows for a consolidated salary, including the house allowance, the same must be considered in the minimum wage due. The Wage Orders provide the minimum. An employer can only lawfully pay above the minimum but not under such minimum. To do so is unlawful;
- (2) This section shall not apply to an employee whose contract of service—
- (a) Contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
36. The respondent was working at Taru Station. This is outside the city area. In 2020, the wage due for a night security guard is ksh.8, 636.30 basic. The house allowance due is ksh.1, 295.45 total gross Ksh.9, 931.75
37. There was no underpayment. The wage claimed did not apply to the respondent's area of work.
38. The contract signed by the respondent provided 52 hours of overtime for a total of 4 hours each day. Where he worked overtime, his wages were paid over and above the legal minimum of Ksh.9, 931.75. The claim for payment above the Ksh.12,000 paid is not justified.
39. On the claim for work during public holidays, such days are not general. The Minister publishes each. In the case of *Rogoli Ole Manadieggi v General Cargo Services Limited* [2016] eKLR, the court held that;
- It is true the employer is the custodian of employment records. In claiming overtime, however, the employee is not deemed to establish the claim for overtime by default of the employer bringing such employment records to court. Establishing hours or days served more than the legal maximum rests with the employee. The claimant did not show in the trial court when he put in excess hours when he worked on public holidays or even rest days....he did not justify the global figure claimed in overtime, showing specifically how it was arrived at. ...
40. The claimed public holidays must be particularized to allow the employer to assess and respond and for the court to review and allow or disallow them.
41. The appeal is with merit and is hereby allowed. The judgment in Mombasa CMELRC E373 of 2023 is hereby set aside. Each party is to bear their costs in this court and the trial court.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 27 DAY OF FEBRUARY 2025.

M. MBARŪ

JUDGE

