Security Alert Services Limited v Kebuko (Appeal E114 of 2024)
[2025] KEELRC 333 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 333 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E114 OF 2024

M MBARŨ, J

FEBRUARY 6, 2025

BETWEEN

SECURITY ALERT SERVICES LIMITED ..... APPELLANT

AND

ROSEMARY MASAYI KEBUKO ..... RESPONDENT

(Being an appeal from the judgment of Hon. J Nyariki delivered on 7 May 2024 in Mombasa CMELRC Cause No.424 of 2021)

JUDGMENT

1. The appeal arises from the judgment delivered on 7 May 2024 in Mombasa CM ELRC No.424 of 2021. The appellant is seeking that the judgment be set aside and the respondent's claim dismissed with costs.

2. The respondent filed a claim before the trial court on the basis that she was employed by the appellant as a day guard in February 2013 at a wage of Ksh.6, 800 per month. In July 2020, the appellant terminated her employment, and on 5 August 2020, she was directed to fill a backdated leave form to indicate that it commenced on 1 July 2020. No end date was indicated. The respondent made various efforts to resume her duties to no avail. She claimed that under Section 37 of the *Employment Act*, her employment converted from casual to permanent. There was no notice before termination of employment, and no reasons were given. She worked for 12 hours each day without any off days plus public holidays without compensation. The claims were;

    a. Notice pay Ksh.13,572.90;

    b. House allowances for 52 months Ksh.105,868.62;

    c. Overtime for 52 months at 4 hours each day Ksh.756,912;

    d. Rest days at 4 days each month for 52 months Ksh.25,230.40;

e. Underpayments for 52 months Ksh.352,190.80;

f. 12 months compensation;

g. Costs of the suit.

3. In response, the appellant admitted that the respondent applied for the security guard position on 12 February 2024. An oral agreement was issued with deployment on 3 March 2014. The respondent worked under two contracts from 3 March 2014 and terminated upon the respondent leaving employment on 8 January 2016. A second contract started on 1 February 2018 and terminated mutually on 11 February 2021. The first contract was terminated when the respondent admitted through a letter dated 8 January 2016 to the disappearance of a parcel when deployed at Coast Bus offices in Mwembe Tayari. She committed to compensating the client for the parcel.

4. The response was also that the client where the respondent was deployed terminated its contract with the appellant due to COVID-19 effects. The appellant had no assignment to place the respondent and agreed that she would take her leave days and then be redeployed. She signed a leave form to end on 20 August 2020 but failed to report back, only to return on 11 February 2021. Parties agreed to mutually terminate employment with computation of terminal dues on 11 February 2021. The respondent was not a casual employee, and the parties had no written agreement. Work was for 8 hours each day, and employment was terminated through mutual agreement and payment of all terminal dues.

5. The learned magistrate heard the parties, delivered judgment on 7 May 2024, and held that the appellant had terminated the respondent's employment unfairly and awarded Ksh.528, 938.48 plus costs.

   The award comprised;

   a. Notice pay ksh.13,872.88;

   b. Compensation Ksh.162,874.80;

   c. Underlayment Ksh.352, 190.80.

6. Aggrieved by the judgment, the appellant filed this appeal on 15 grounds.

7. The appellant's case is that the trial court erred in law and fact in failing to appreciate the evidence on record in its totality by considering the oral and written submissions by the appellant. The finding that the respondent worked for 8 years was in error and failed to consider that the respondent resigned from her employment twice. The trial court erred in law and fact in finding an unfair termination of employment contrary to section 43 of the *Employment Act* since the respondent had resigned. The respondent did not produce any documentary evidence about her employment. The Discharge Note dated 11 February 2021 was erroneously termed as a letter of suspension or dismissal was in error.

8. Other grounds of appeal are that the trial court erred in law and fact in finding that there was noncompliance with section 41 of the *Employment Act*, which was not necessary upon resignation. Had the evidence presented been analyzed, the claim should have been dismissed with costs.

   Both parties attended and agreed to file written submissions.

9. The appellant submitted that the respondent alleged that she worked for the appellant company for eight years. This allegation is solely based on the fact that she interacted with the appellant company for the eight alleged years. The appellant produced a job application letter dated 1 February 2018. She re-applied for the same position; hence, there was a stoppage of employment from February 2018. The respondent worked for two years under the second oral contract. The appellant's witness testified that

the respondent was allowed back to work on or about the year 2019, corroborating the job application letter written and signed by the respondent herein.

10. The respondent resigned and was not unlawfully terminated by the appellant company. She was not an upstanding employee. As stated by the appellant's witness, her history of employment involved absconding work. She had to re-apply for the same job. The appellant did not want to terminate the Respondent's employment but was looking for a position to redeploy her when she resigned. A resignation is a formal notification of relinquishing an office or position. In the case of Civil Appeal No.228 of 2004 Sanltam Services (E A) Ltd v Rentokil (K) Ltd & another [2006] eKLR, the court held that;

> ...this Court will not lightly differ from the Judge at first instance on a finding of fact. That was underscored in Peters v Sunday Post Ltd [1958] EA 424 at pg 429, thus: " It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.
>
> But the jurisdiction "(to review the evidence) should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion.

11. The learned trial magistrate referenced non-existent documents. There is no letter of dismissal or suspension on record or proof that the respondent herein wrote to the Appellant Company asking for particulars of her employment. In the case of Nairobi ELRC Cause No. 878 of 2017 Ayonga V Falcon Signs Ltd [2023] KEELRC 300(KLR), the court held that;

> Resignation is one mode of terminating the employer-employee relationship. It is a tool that an employee can use to trigger his separation from the employer.
>
> Being a unilateral act, the employee who wishes to sever the employer-employee relation can elect to serve the employer with a resignation. The resignation may be expressed to take effect immediately or later, as indicated by the employee.

12. In the case of Civil Case No. 598 of 2005, William Kariuki vs Kenya Civil Aviation Authority (2008) eKLR, the court held that;

> In this court's opinion, the plaintiff had resigned from the defendant's employment, and the defendant had accepted that resignation, which fact was acknowledged in the letter complained of. Thus, the relationship of employer/employee had been thereby severed. As such, the plaintiff, having ceased being an employee of the defendant from 31.3.2005, was capable of being dismissed.

13. The appellant was not required to adhere to Sections 41 and 43 of the *Employment Act* as there was no termination. Further, the appellant's witness did not highlight any gross misconduct that necessitated the leave but testified that the leave resulted from no available client to re-deploy the respondent to work. The Court should, therefore, set aside the Judgment dated 7 May 2024.

Determination

14. This is a first appeal. The court is called to reevaluate the entire record and reach its conclusions.

15. It is common cause that the respondent applied for employment with the appellant through a letter dated February 2014 and was deployed. There is also another employment application letter dated 1 February 2018.

16. The respondent's case was that she was employed without any written agreement from 2013 to 2020 when her employment was unfairly terminated.

17. The appellant asserts that there was no oral or written employment agreement, but the respondent worked in two phases based on the letters made for employment. Each phase ended with a resignation notice.

18. The resignation notices have not been attached. There is a Discharge Note dated 11 February 2021. The appellant explained the Discharge Note that it was a mutual separation agreement upon the respondent's resignation after she had abandoned her employment following annual leave from 1 July 2020.

19. It is the legal duty of the employer to issue the employee with a written contract of employment stating the terms and conditions of employment as required under Section 10(3) of the *Employment Act*. The failure to issue an employee who has worked for an extended period with a written contract of service is an employment offence. In this case, it exposed the appellant. The court must rely on the employee's word without a written contract.

20. The admission that there was employment without an oral or written contract does not remove the appellant from the legal duty to issue an employment contract. For the continuous employment of the respondent by the appellant without any written agreement, she became protected under Section 37 of the *Employment Act*. She had rights and benefits under the Act.

21. The Discharge Note stated that the mutual separation agreement cannot apply to discharge the appellant from any lawful claims by the respondent under Section 35(4) of the *Employment Act*;

> (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.

22. The Discharge Note must be given context. It cannot remove the employee's right to claim what is lawfully and unfairly denied within her employment.

23. The admission in the Discharge Note that the appellant owed the respondent ksh.3, 500 in terminal dues confirms there was employment. The particulars of the payment are not addressed.

24. After the execution of the Discharge Note, the respondent made her claim seeking terminal dues inducing unfair termination of employment and payment of terminal dues. These must be assessed and addressed on the merits.

25. Based on the records filed, the respondent applied for employment with the appellant in February 2014 and was deployed on 1 March 2014 without any letter of resignation or notice terminating employment.

    Employment commenced on 1 March 2014.

26. Without the termination notice either from the appellant or respondent, the word of the respondent is that employment was terminated after she took annual leave upon applying on 1 July 2020. She was not allowed back to work.

27. The appellant's case is that the respondent did not resume duty and only returned on 11 February 2021 seeking payment of her dues and declined redeployment. An employee does not terminate her employment.

28. An employee who absences herself from work absconds duty without justification, or abandons employment without good cause commits gross misconduct. The employer must address and bring closure to the employment relationship. Living the employee at large only exposes the employer to claims such as herein as held in Ayub Kombe Ziro v Umoja Rubber Products Limited [2022] KEELRC 141 (KLR), and Nyali Academy Service Limited t/a The Mombasa Academy v Muli {2023] KEELRC 2041 (KLR) that;

> ... the employee who deserts, absconds or abandons her employment does not dismiss herself. The decision to formally end the employment relationship should come from the innocent party, the employer.

29. The rationale is that absence from work without permission and approval by the employer is defined as gross misconduct under Section 44 of the *Employment Act*. The employee must issue notice to the employee to attend and address such gross misconduct. The employer should bring the employee to account if she remains absent from work without permission and where such gross misconduct is not addressed, the employer must invoke its rights and issue notice terminating employment to the employer and copy to the Labour Office under Section 18(5)(b) of the *Employment Act*. Otherwise, employment terminates unfairly without valid reasons or justification as held in Ngei v Viljoen & 2 others [2023] KECA 851 (KLR) and Mbugua v Resort [2024] KEELRC 1950 (KLR).

30. The trial court analyzed the pleadings, evidence, and law and made correct findings. The court cannot be faulted for finding that the respondent worked for the appellant for 8 years.

31. There were no written reasons for termination of employment. The respondent was not given due process for any justified cause, and the Discharge Note does not remove the appellant from the application of the law.

    Notice pay and compensation were well assessed.

32. On the claims for house allowance, this has been defined as a continuing injury under Section 89 of the *Employment Act*. The non-payment of any due house allowance accrues monthly and must be addressed within 12 months from the date of cessation as held in Ddaiddo v Bank of India (K) Ltd [2024] KECA 749 (KLR) that upon the dismissal of the employee, any claim based on a continuing injury ought to have been filed within one year failing which it was time-barred. In the case of Kenya Railways Corporation v Ododa & 216 others [2024] KECA 1620 (KLR), the court emphasized that a continuing wrong is a wrong arising out of a continuous breach of an obligation which transcends a single completed act or omission. The obligation so breached must be one borne of law or agreement between parties and which gives rise to an actionable claim. Such a claim must be addressed within 12 months under Section 90 (now 89) of the *Employment Act*.

33. In this regard, the respondent was terminated without notice after taking annual leave in July 2020 but was issued a Discharge Note on 11 February 2021. The claim was filed on 30 June 2021, within time to claim the due house allowance and other benefits due to continuing injury.

    The respondent was working as a day security guard in Mombasa County.

34. Under the Wage Orders, such a position accrued a minimum wage of Ksh.13 572.90, which was acknowledged as the paid wage. Under this basic wage, a 15% house allowance was due for Ksh.2, 035.94 x 12 total underpayments and a house allowance of Ksh.24, 431.22.

35. The claim for overtime, as a continuing injury, like the house allowance, only accrues under the provisions of Section 89 of the *Employment Act*. Without work records and worksheets on the reporting time and exit, the claim is justified for each day. Due is 4 x 30 x 12 x 121.30. The total dues are Ksh.121, 672 in overtime pay.

36. There is no record of the rest days taken by the respondent under Section 27 of the *Employment Act*. Such is due for the 12 months since employment terminated. The claim is justified for 1 x 4 x 12 x 121.30 Ksh.5, 822.40

37. On the claim for underpayments, save to urge the court that there were underpayments, the respondent did not particularize the various years and what was paid from 2014. The last wage paid at Ksh.13, 572.90 was in terms of the Wage Orders and the aspect of house allowance is addressed above.

38. The respondent's claim had a good foundation and justified the awarded costs.

39. Accordingly, as analyzed above, the judgment in Mombasa CMELRC No.424 of 2021 is hereby reviewed in the following terms;

40. The employment of the respondent by the appellant was terminated unfairly;

    a. Compensation Ksh.162,874.80;

    b. Notice pay Ksh.13,872.90;

    c. Overtime Ksh.121,672;

    d. Rest days ksh.5,822.40;

    e. House allowances Ksh.24,431.22;

    f. Costs of the trial court as awarded;

    g. The appellant is to meet 25% of the costs for the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF FEBRUARY 2025.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....