Hatari Security Guards Limited v Dalu (Appeal E043 of 2024)
[2025] KEELRC 1169 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1169 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E043 OF 2024

K OCHARO, J

APRIL 24, 2025

BETWEEN

HATARI SECURITY GUARDS LIMITED ..... APPELLANT

AND

MREMA MAHUPA DALU ..... RESPONDENT

(Being an appeal against the Judgment delivered on 29th November 2024 by Hon. D. M. MBEJA (PM) in Mombasa CM-ELRC No. E 057 of 2021)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 18th March 2024, the Appellant challenges the Judgment and Decree of the Learned Principal Magistrate in the cause mentioned above, on the principal grounds that he erred in law and fact;

   [a] Holding that the Respondent's employment was unfairly terminated against the weight of the evidence on record that showed that he absconded from duty on several occasions.

   [b] When he applied wrong principles in awarding the Respondent salary in lieu of notice, KShs. 17, 413.24.

   [c] When he awarded the Respondent KShs. 37,505 as compensation for unutilized leave days in spite of the evidence that leave was taken.

   [d] When he allowed the Respondent's claim for underpayments and awarded KShs. 192, 635.

   [e] When he applied the wrong principles when awarding the Respondent KShs, 208,958.88 as compensation for unfair termination.

[f] When he applied the wrong principles when awarding the Respondent KShs, 403,241.76 as compensation for overtime.

[h] When he failed to consider the Appellant's submissions in the matter.

[g] When he awarded the Respondent the costs of the suit.

2. The Appellant consequently seeks that: -

1. This Appeal is allowed.

2. That the Judgment of the subordinate Court delivered on 29th February 2024, be set aside, and this court dismisses the lower court suit.

3. The costs of this Appeal are to be awarded to the Appellant.

3. This appeal was canvassed by way of written submissions.

The case before the Trial Court

4. The Respondent's case was that he first came into the employment of the Appellant on 1st November 2017, as a night Security Guard. He was deployed to guard the NSSF premises in Mombasa at all material times.

5. During a parade, which was held on 31st July, 2020, he was informed [together with his colleagues] by the Appellant's officer in charge that its contract for guarding the premises as mentioned above was to lapse at midnight of that day, and that it was their last day of work at the station.

6. He was asked to report to the Appellant's offices in the Mkomani area of Mombasa on 1 August 2020. When he attended the office, he was informed that his employment as the contract between the National Social Security Fund and the Appellant had lapsed and as such, there was no assignment for him.

7. The Appellant asked him and his colleagues to tender resignation letters and surrender all its property as a precondition for payment of their terminal dues. Following this, he involuntarily resigned. As such, he was constructively dismissed from his employment, effective 1st August 2020.

8. The basis for his claim for constructive dismissal was that the Appellant failed to allocate work and coerced him to issue a resignation letter as a condition for payment of his terminal dues.

9. At the time of the dismissal, he was earning a gross salary of KShs. 10,400.

10. He further claimed that until the termination, he was grossly underpaid, earning a salary below the minimum wage under the relevant Regulation of Wages Orders for the period November 2017 to July 2020.

11. At all material times, and contrary to the statutory requirements, the Appellant was neither paying his housing allowance nor providing him with reasonable accommodation.

12. The Appellant subjected him to working twelve hours on all regular working days, Sundays (Rest days), and Public holidays without compensating him for the overtime per the Regulation of Wages and Conditions of Employment [Private Security Services] Order.

13. Throughout his employment, the Appellant never allowed him to take his annual leave nor paid him in lieu.

14. The Appellant contended that it employed the Respondent as a day security guard and was deployed to work in Mombasa, seconded to work for Rift Valley Railways Limited

15. Rift Valley Railways Limited engaged them to offer security services while it was still pursuing concessions from the Kenya Railways Corporation Limited. Rift Valley Railways Limited assured them they would pay for the services rendered after finalising the concession process.

16. On the strength of the undertaking, they took loans to partly finance the wage bill of their security guards, who were rendering security services to Rift Valley Limited. They hoped that once they were paid, they would be able to liquidate the loans and clear salary arrears owed to their employees.

17. The concessions were never given until 2006, when the two companies, Kenya Railways Corporation and Rift Valley Ltd, agreed. At the time, they were owed by Rift Valley Ltd, KShs. 102, 774,938. In an unfortunate turn of events, the concession was nullified by the High Court through its Judgment of 31st July 2017. This culminated in the non-payment of this sum that was owed and crippling of their operations. The money was never paid.

18. Following the events, the Respondent was redeployed to guard the NSSF premises in Mombasa with his colleagues who had been serving Rift Valley Railways.

19. Contrary to the Respondent's assertion, he was not at any time asked to tender a resignation letter on the account that the Appellant no longer had a contract with the NSSF or asked to surrender her work uniform and identification card.

20. On the expiry of Appellant's contract with NSSF, the Appellant instructed its employees, including the Respondent, to attend continuous security training at Themy Training School in Nairobi, awaiting redeployment. Instead of attending the training, the Respondent decided to resign of his own volition.

21. It was their policy that if an employee worked extra hours, they were required to fill out an overtime form, which would then be taken to the Human Resource Department to process overtime payment. The Appellant never worked overtime and never filled out the forms.

22. At his resignation, the Respondent was paid Kshs. 15,400 in lieu of annual leave for the two years worked.

The Judgment by the Lower Court.

23. After hearing the parties on their respective cases, the Learned Trial Magistrate held that the Appellant was an employee who was in haste to get rid of the Respondent, an unfair act. Further, the process leading to the termination of the claimant was unfair as he was not subjected to a fair disciplinary hearing and was not invited to show cause why his contract shouldn't be terminated.

24. In conclusion, he held that a case for wrongful, unfair, and unlawful termination had been made and awarded the reliefs sought.

The Appeal.

25. The Appellant, aggrieved by the decision of the Trial Court, filed the present Appeal on the grounds set out hereinabove.

Analysis and Determination

26. It is now trite that the role of a first Appellate Court is to subject the evidence and material that were placed before the trial Court to fresh scrutiny, allowing it to come to its own independent findings

and conclusions. This position was aptly elaborated in the case of Selle v Associated Motor Boat Co. [1968] EA 123) where the Court held: -

> " An appeal to this Court from a trial by the High Court is by way of retrial, 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 necessarily bound 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 if 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 E.A.C.A. 270)".

27. In the German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) the Court of Appeal held that: -

> " A first appeal is a valuable right of the parties and, unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court's conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we, unlike the ELRC, did not have the benefit of seeing the witnesses testify. (See Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212)."

28. Bearing in mind its mandate as aforesaid, this Court has carefully considered and analysed the material that was placed before the Learned trial Magistrate, the submissions filed and authorities relied on by the parties, and hold that the grounds can be condensed and justly interrogated and determined under two broad issues, thus, whether the Respondent's employment was unfairly terminated, and whether the Respondent was entitled to the reliefs as granted by lower court.

29. Section 47[5] of the *Employment Act*, 2007, provides for a reverse burden of proof. The employee alleging unfair termination of employment or wrongful dismissal from employment must prove prima facie that an unfair termination or wrongful dismissal occurred. It is then that the burden of proof shifts to the employer to demonstrate the reason[s] for the termination or dismissal, and that the termination or dismissal was justified. As will emerge shortly hereunder, the material before the Learned trial Magistrate was ample for a conclusion that the Respondent discharged the burden.

30. It is not disputed that, leading to the separation, the Appellant had lost a contract for the provision of security services between it and the National Social Security Fund, and the Respondent tendered a resignation letter, thereby ending his contract of service.

31. The Appellant's Counsel submits that the Respondent's employment was not terminated as alleged. He voluntarily resigned via a letter dated 1 August 2020, which was duly accepted.

32. The Appellant asserted under paragraph 17 of its memorandum of response that when it lost the above-stated contract, the Respondent and the other affected employees were instructed to attend its Training School in Nairobi, daily. This Court hasn't lost sight of the fact that the Respondent and the other employees were stationed at Mombasa, as comes out in the evidence of the Appellant's witness and the Respondent. One could then reasonably expect to see formal or discernible instructions to the affected on how and when they were to move to the school and the logistical aspects of the movement. The Appellant didn't place forth any material showing the existence of the instructions. All that was done was to make a bare assertion supported by non-cogent evidence. I am not convinced, therefore, that the Appellant took the action it purports to have taken, after losing the contract.

33. The Respondent, on the other hand, contended that his resignation was ignited by the conduct of the Appellant, thus failing to assign him work and coercing him to write the resignation letter, conduct which amounted to constructive dismissal.

34. Constructive dismissal is not codified in Kenyan statutes; however, it has gained definition through judicial jurisprudence. Although it has no common law antecedent, it corresponds to the concept of the employer repudiating the contract of employment and acceptance thereof by the employee, thus ending the contract. The courts have accepted constructive dismissal to mean actions on the part of the employer that drive the employee to leave, whether or not there is a form of resignation.

35. The circumstances of constructive dismissal are so infinitely various that an exhaustive list of what circumstances justify and what do not. It is a question of fact for the court.

36. As held in Porter v N.B Legal Aid [2015]1. S.R.C. constructive dismissal has two branches. First, the Court must identify an express or implied contract term that has been breached and determine whether the breach was sufficiently serious to constitute constructive dismissal. However, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. This approach is necessarily retrospective, as it requires consideration of the cumulative effect of the past acts of the employer and determination of whether those acts evinced an intention to be no longer bound by the contract.

37. The Court of Appeal in Coca Cola East & Central Africa Limited v Maria Ligaga [2015] eKLR summarised the factors for consideration in a constructive dismissal claim, thus;

    a. "What were the fundamental or essential terms of the contract of employment?

    b. Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer?

    c. The employer's conduct must be a fundamental or significant breach that goes to the root of the contract of employment or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

    d. An objective is to be applied in evaluating the employer's conduct.

    e. There must be a causal link between the employer's conduct and the reason for the employee terminating the contract, i.e causation must be proved.

    f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.

g. The employer must not have accepted, waived, or acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must, within a reasonable time, terminate the employment relationship pursuant to the breach.

h. The burden to prove the repudiatory breach or constructive dismissal is on the employee.

i. Facts giving rise to a repudiatory breach or constructive dismissal are varied.

38. One of the most crucial obligations of the employer under a contract of employment is to supply work to the employee at all material times. Where the employer ceases to assign duties to an employee, in my view, it equates to a breach of a fundamental term of the contract of employment, and a demonstration that they no longer evince being bound by the terms of the contract.

39. Having held as I have hereinabove, that I am not convinced that the Appellant immediately after losing the contract with NSSF, took the alleged action to retain the Respondent in employment pending redeployment, I take a clear view that the Appellant didn't do so. They consequently didn't continue supplying him with work. They evinced an intention to be no longer bound by the terms of the contract. The Respondent wrote the resignation letter in the circumstances he explained. The Appellant's contract directly caused the resignation.

40. In the upshot, I am persuaded that the Respondent was constructively dismissed.

41. It is essential to point out that the Learned trial Magistrate didn't duly consider the Respondent's claim as a constructive dismissal claim, as was pleaded by the Respondent, and this informs why he, with great respect, went off the mark to consider aspects like procedural and substantive fairness in detail, aspects that are irrelevant in a claim for constructive dismissal. This notwithstanding, I come to the conclusion hereinabove following a fresh reevaluation of the material placed before him.

42. I now consider the Learned Trial Magistrate's decision on the reliefs the Respondent had sought. Quite improperly, in awarding the reliefs in favour of the Respondent, the Learned Trial Magistrate did it in a very general way, granting them as prayed. This was improper because some of the reliefs that he granted were pursuant to the exercise of discretion and, as such, required him to express reasons for the exercise in the manner he did. Others were independent of the claim for unfair termination, and ought to have been considered as such.

43. Section 49[1][c] of the *Employment Act* empowers the court to grant an employee compensatory relief for unfair termination of employment or wrongful dismissal. However, it is essential to point out that the power is discretionarily exercised depending on the circumstances of each case. The Learned Trial Magistrate granted the Respondent twelve months' gross pay without setting out the factors he considered to arrive at the award.

44. I have carefully considered the circumstances of the constructive dismissal, the fact that the Respondent didn't contribute to the termination of his employment, the length of service of the Respondent, and that, undoubtedly, the situation was induced by lose of the NSSF contract by the Appellant, and hold that he was entitled to the compensatory relief to an extent of five months' gross salary.

45. The Respondent's employment was terminable under section 35 of the *Employment Act* by a twenty-eight days' notice. Having successfully litigated his claim for constructive dismissal, no doubt, notice pay is a relief he was entitled to.

46. Section 48 [1] of the *Labour Institutions Act* provides;

> " 1 Notwithstanding anything contained in this Act or any other written law-
>
> a. The minimum rates of remuneration or conditions of employment established in wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement.
>
> b. If the contract of an employee to whom a wages order applies provides for payment of less remuneration than the statutory minimum remuneration, or does not provide for conditions of employment prescribed in wages regulation order or provide for less favorable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms."

47. Counsel for the Appellant argued that the Respondent was at all material times paid his contractual remuneration. As such, his claim for compensation for the alleged salary underpayments was not founded. In my view, the argument ignores the above set-out provision. A minimum wage or a condition provided for in a wages order cannot be outcontracted.

48. It was the Respondent's case that he was a night guard. The Appellant submitted that he was a daytime watchman. This Court notes that the Appellant's witness in his evidence under cross-examination before the trial Court, expressly stated that he was not in a position to state whether or not the Respondent was a night guard. Therefore, the Respondent's evidence that he was a night guard was not discounted. The Learned Trial Magistrate didn't err in applying the minimum wage 17,413.24.

49. The Appellant contended that the Learned Trial Magistrate erroneously and without basis, awarded the Claimant a sum of KShs. 403, 241.76 as compensation for overtime that was never paid to him. The Respondent's claim for overtime was based on the fact that, contrary to Rule 6 of the Regulation of Wages [Protective Security Services] Order 1998, he worked twelve hours (6.00 am-6.00 pm) a day for six days a week instead of the 10 hours. The Appellant asserted that the Trial Court wouldn't have allowed the Respondent's claim under the head, as the Respondent didn't place any worksheets forth to establish it.

50. I am not persuaded that the Appellant's argument is correct. First, the Regulations placed a legal duty on it to ensure that its employees worked for not more than the stipulated hours and, if they did, ensure payment for the overtime. It would follow, therefore, that when an employee asserts, as did the Respondent, that he was caused to work overtime without compensation, it behoved the employer to demonstrate its compliance with the law at all times, to counter the employee's assertion.

51. Secondly, the employer is the custodian of employment records under section 74 of the *Employment Act*. In this matter, he was expected to produce the worksheets, not the Respondent. I note that the contract of employment tendered in evidence didn't stipulate the hours of work. In the absence of the term, under section 10 of the *Employment Act*, the onus was on the Appellant to prove that the Respondent worked within the statutory hours at all times and not overtime as he alleged. This it didn't do. I have no option but to hold that the Learned Trial Magistrate did not err in his analysis of the claim and in allowing it.

52. This Court has not lost sight of the Appellant's witness's testimony before the trial Court that the Human Resources Department would handle and keep the overtime worksheets and that the witness wasn't from that department. Keenly looking at his testimony, a safe conclusion can be drawn that he wasn't very conversant with the facts of the matter.

53. The Appellant's appeal succeeds to a limited extent, in the upshot. The Learned Trial Magistrate's award of twelve months' gross salary for unfair termination is hereby disturbed. In place thereof, I award five months' gross salary, KShs. 87, 066.2. Each party is to bear its own costs of this appeal.

54. Orders accordingly.

READ SIGNED AND DELIVERED THIS 24TH DAY OF APRIL 2025.

OCHARO KEBIRA.

JUDGE

In the presence of:

Mr. ..... for Appellant.

Mr. ..... for Respondent