



**Mars Security Guards Limited v Omedi (Appeal E270 of 2023)
[2025] KEELRC 1591 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1591 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E270 OF 2023**

**JW KELI, J
MAY 23, 2025**

BETWEEN

MARS SECURITY GUARDS LIMITED APPELLANT

AND

ALEX OMEDI RESPONDENT

(Being an Appeal from the Judgment and Orders of the Honourable R.L. Musiega (SRM) delivered at Nairobi on the 1st of December, 2023 in MCELRC No. E380 of 2022)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable R.L. Musiega (SRM) delivered at Nairobi on the 1st of December, 2023 in MCELRC No. E380 of 2022 between the parties filed a memorandum of appeal dated 28th day of December, 2023 seeking the following orders:-
 - a)) The Appellant prays that this appeal be allowed with costs to the Appellant and the Judgment of the Chief Magistrate’s Court be revised and the suit be dismissed with costs to the Appellant.

Grounds Of The Appeal

2. The Honourable Magistrate erred in law and in fact when he found that the Respondent was entitled to unpaid leave of Kshs. 33,400/-.
3. The Honourable Magistrate erred in law and in fact by failing to evaluate correctly the evidence adduced by the Appellant and consequently arriving at a conclusion that has no legal or factual basis.
4. The Honourable Magistrate erred in law and in fact in awarding salaries for March and April 2019 of Kshs. 33,400/-.



Background To The Appeal

5. The Respondent filed a claim against the Appellant vide a memorandum of claim dated 1st September 2021 seeking the following orders:-
 - A. The Claimant prays that the court do order and make award for:
 - a. Compensation for unfair termination Kshs. 230,460/-
 - b. Unpaid House Allowance Kshs. 293,085/-
 - c. Payment for Annual Leave days not taken Kshs. 38,410/-
 - d. Unpaid March 2019 and April 2019 salaries Kshs. 38,410/-
 - e. Service pay Kshs. 96,020/-
 - f. Costs of this suit
 - g. Interest on (a) to €
 - h. Any other relief the court may deem fit and just to award.

Pages 1-6 of the ROA dated 4th December 2024).
6. The respondent filed his verifying affidavit, his list of witnesses, his witness statement and list and bundle of documents all dated 1st of September 2021 (see pages 7-24 of ROA).
7. The claim was opposed by the Appellant who entered appearance and filed a response to the memorandum of claim (pages 28-30 of ROA); List of Witnesses (page 31 of ROA); Witness statement of Jackson Orondo dated 6th July 2022 (pages 56 -57 of ROA), and produced as its documents employment records attached to their List of Documents dated 20th April 2022 (pages 32-55 of ROA).
8. The Claimant's/Respondent's case was heard on the 23rd of August 2023 where the claimant testified in the case, produced his documents, and was cross-examined by counsel for the appellant Mr. Otieno (pages 146-147 of ROA).
9. The Appellant's case was heard on the same date where RW1 was Jackson Otieno Pondo who relied on his filed witness statement and produced the Appellant's documents. He was cross-examined by counsel for the claimant Mr. Odhiambo (pages 148-151 of ROA)
10. The parties took directions on filing of written submissions after the hearing. The parties complied.
11. The Trial Magistrate Court delivered its judgment on the 1st of December 2023 awarding the claimant a total sum of Kshs. 66,800/- comprising of leave pay for 2 years, and unpaid salaries for March 2019 and April 2019 (Judgment at pages 154-158 of ROA).

Determination

12. The appeal was canvassed by way of written submissions. Both parties filed.
13. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the court is not bound



necessarily 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."

14. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 *De Lestang V.P (As He Then Was) Observed At Page 94*: "I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

15. The appellant and the respondent submitted on the merit of the appeal with respect to the award of leave in lieu and claim for unpaid salary.
16. The court then finds that the issue for determination in the appeal is whether the appeal is merited.

Appellant's submissions

17. On ground of the memorandum of appeal (a) - the learned Magistrate erred in law and in fact in finding that the Respondent was entitled to unpaid leave of KShs. 33,400. The Learned Magistrate recognized that there was a letter dated 30/03/2019 written by the Respondent asking to be allowed to sell his leave days to pay for the lost items and then goes ahead to award the said claim. (See page 157 of the Record of Appeal) The Appellant produced documentation to the effect that the Respondent requested for sale of his leave days to cater for the losses at his place of work. The Appellant's list of documents in the lower court dated 20/04/2022 at page 10 clearly shows a letter is at page 37 of the record of Appeal. The Respondent on cross-examination, stated that he wrote a letter saying he was responsible for items lost at his area of work. He also confirmed that he agreed to pay for losses at his work place. (See page 147 of the record of appeal dated 4th December 2024).
18. The appellant submitted that further, it is worth noting that the Respondent was not coerced into writing the said letter dated 30/03/2019 to sell his leave days to cater for the lost items. The items which were lost under the Respondent's watch were a wheelbarrow and a generator. The value alone is higher than the amount for the leave days. Given the foregoing, the Appellant's appeal under this head should succeed as the Respondent voluntarily agreed to sale his leave days to cater for the lost items. He is therefore not entitled to any leave pay.
19. Ground (c) of the appeal. The Learned Magistrate erred in law and in fact in awarding salaries for March and April 2019. The appellant submitted that the Respondent absconded from duty from 23rd March 2019 to 12th April 2019 when he submitted his resignation letter. The Respondent resigned effective 12th April 2019. He is therefore not entitled to pay from 12th of April to 30th April 2019 as he was not in employment. Furthermore, the Respondent absconded duty from 23rd March 2019 meaning that he is not entitled to pay from the beginning of April to 12th of April 2019 as there was no work done nor was he suspended. Ideally he is not entitled to pay for the entirety of the month of April 2019. The Appellant's witness confirmed in re-examination that they communicated with the Respondent on 09/03/2019 and that he was to report back on 13/03/2019 but did not report back until they received the resignation letter. (This is at page 151 of the record of appeal) The Salary from the beginning of March upto 13/03/2019 went to catering for the lost items as had been requested by him via letter dated 13/03/2019 (The Letter is at page 39 of the record of Appeal). In light of the above, the judgement regarding this matter in the lower court ought to be set aside.



Respondent's submissions

On the 'sale' of leave days

20. The Respondent submitted that it is trite law that the employer must produce records of employment to disprove an employee's claim. In the instant case of leave days, the Appellant ought to have produced leave records showing the number of days taken by the Respondent, the dates when leave was taken and the balance of leave days. This was not done. He is under an obligation under section 74 to keep and produce records when required for the employees. He failed to do so; hence, every averment by the Employee should be relied upon by the court.
21. In their defence, the Appellant argued that the Respondent sold her(sic) leave days supposedly to offset losses incurred by a client whose property he was guarding. The respondent urged that there is no such thing as selling one's leave days. Leave days are a statutory entitlement. It can either be taken or waived (in which case, payment of one month's salary is made instead). One cannot sell his statutory right.
22. The respondent further submitted that he was not formally accused through show cause letter, invited to disciplinary hearing and a decision to surcharge him made. The Appellant did not exhibit a show cause letter putting the Respondent on notice that his remuneration is being considered for surcharge. The Respondent was not given a fair hearing in the presence of a witness of his choice and he was not found responsible for the loss and a decision to surcharge him made. The submissions by the Appellant that the Respondent admitted wrongdoing and accepted to sell his leave days are untrue. In the Respondent's letter dated 30th March 2019, the Respondent stated as follows: "...due to the client's demand that they want their items back, I am politely requesting you to allow me sell my overdue annual leave to pay back the amount that is needed. Sir, kindly waiting for your positive communication such that I can continue with my duty..." In a document titled 'Questions to Alex Omedi' the Respondent is recorded to have stated:

“...I do not know anything because I do not know what happened.” The above excerpts of the documents show that the Respondent did not admit wrongdoing and was waiting for further action on the matter. The Appellant was obligated by law to investigate the theft and make a decision including commencement of disciplinary action. This was not done. They simply decided to hold the Respondent liable' for the loss which was a unilateral decision.”
23. The Respondent submitted that the Appellant was wrong in 'buying' the Respondent's leave days without lawful authority. There was no policy or employee manual permitting the Appellant to surcharge employees for any loss at their places of work. That disciplinary actions have serious implications on employee's work conditions and such must be documented in the contract for the same to be lawful. The Appellant did not exhibit a written finding of the disciplinary process or a verdict of surcharge as a disciplinary action. The respondent contended that surcharge affects salaries and not leave days. If an employee is found at fault and surcharge is the verdict, deductions are made on his/her salary and not leave days. That the value of the lost items was not provided by the owner. Neither the Appellant nor the Respondent knew the amount for which the leave days were 'sold'. The respondent relied on the decision in Joseph Makau Munyao & 4 others v Kenya Ports Authority & another [2016] KEELRC 1692 (KLR) where the court found surcharge (though anchored in the employment contract) was arbitrary as the loss and the specific amount was neither pleaded nor proved. That surcharge should be in the form of a special damages and the loss or damage should be quantified and be proved. That the Respondent called one of its Accountants, no serious attempt was made to compute the exact loss/damage attributable to the claimant. The Claimant sought Kshs 245,580/- each



being the amounts surcharged from their wages for 3 months. The Court finds that the surcharges were arbitrary and should be refunded to the Claimants.

24. The Respondent submitted that the trial court was right in disregarding the purported 'sale' of leave days which was akin to surcharge. The exact loss was neither pleaded nor proved and the Respondent did not even know what he was paying for. This ground of appeal is therefore not merited.

II. Unpaid salaries

25. The respondent submitted that before an employment contract is terminated, the employee remains in employment and is entitled to salaries. The argument by the Appellant that the Respondent is not entitled to salary for March 2019 and April 2019 allegedly because he absconded duty is not tenable. That there was no evidence of absconding or even deserting work. The Appellant insists that the Respondent deserted work from 23rd March 2019. The documentary exhibits on record paint a different story. The Claimant wrote a letter on 30th March, 2019 offering his leave days pay to be used to settle the lost items. How can a man who supposedly went missing and became untraceable from 23rd March, 2019 write and deliver a letter on 30th March, 2019 asking to be allowed to continue with his duty? In *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] where the court held that: "Desertion of duty is grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration." [underlined for emphasis].
26. A similar position was taken in *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* [2016] eKLR where Ndolo, J. held that: "Desertion amounts to gross misconduct and renders an employee liable to summary dismissal. However, like all cases of misconduct, it must be proved. It is not enough for an employer to simply state that an employee has deserted duty."
27. It was not contested that the Respondent was not paid salaries for March 2019 and April 2019 which led to his resignation. During this period the Respondent's relationship with the employer had not ceased and he was actively following up on his case so that he could be forgiven and allowed back to work. Further, no communication to the contrary was made by the Appellant on the status of his contract. The trial court was right in awarding the sum as the Respondent was still an employee until the day he resigned in protest.

Decision

28. On whether the trial court erred in law and fact in finding the respondent was entitled to unpaid leave of Kshs. 33,400/- ; The claimant before the trial court sought compensation for leave days for years 2017 and 2018 not taken. In response (page 29 of ROA), the appellant stated that it was not liable to make any payment to the claimant. That in any case, the respondent had to replace the stolen items and is entitled to claim against the claimant. It was not in dispute that some items were stolen at the station of work /customer premises where the claimant had been working. The appellant stated that the matter was reported to police, and on interview it was apparent the claimant was involved in the theft and that he admitted the theft and wrote a statement confirming the position and proposing to pay for the stolen items. (see paragraph 5 (a-e) of the response at page 28 of ROA).
29. The Appellant produced documents in support of its case. The letter of 4th March 2019 is where it all started. The management wrote to the respondent and informed him that it had decided to enter into an agreement with him on the stolen items as it awaited for the client's feedback on any charges the client may bring forward, and the management would hold the claimant liable (page 43 of ROA).



The claimant was then suspended and was to report back on 13th March 2019 (page 42 of ROA). On 13th March 2019 the claimant wrote and stated that he took responsibility over the loss and asked for deduction of Kes 3000 monthly (Page 39 of ROA). In another letter dated 30th March 2019 the claimant wrote to the employer and stated that due to the client's demand for the items, he asked to be allowed to sell his leave to pay for the lost items. He asked for feedback so that he can continue with his duties (page 31 of ROA). On the 12th April 2019 the claimant tendered his resignation and asked the management to tabulate his dues (page 35 of ROA). The appellant produced letter, of even date as the resignation letter, addressed to County Labour Officer where it was stated that on 21st March 2019 the claimant was advised to report back and since then they did not know his whereabouts. That he had absconded.

30. During the cross-examination the claimant confirmed the foregoing documentation and that he agreed to pay for the losses. At re-examination he told the trial court that he agreed to pay for the losses as the management had asked him to compensate for the lost items (pages 147-148 of ROA).
31. RW1 confirmed at cross-examination that the claimant had stated he was innocent over the incident. That there was a disciplinary action over the matter, that the letter dated 24th March 2019 indicated the management would hold the claimant liable. That there was no disciplinary hearing. RW1 told the court the claimant indicated the final dues would be settled against the lost items. That he was not paid final dues. He offered to have his salary deducted by Kes 3000, but the employer did not respond to the offer. They also did not respond to his offer on the leave. RW1 admitted that the claimant had resigned on 12th April 2019. They did not pay his salary in March. That he worked in April, and they did not pay. They accepted the resignation while on duty. That he was on suspension. During re-examination, RW1 told the court the claimant was to report back on the 13th March 2019, but did not until they received his resignation letter. (Trial Proceedings at pages 148-151 of ROA).
32. The trial court held the claimant had resigned voluntarily hence no case of unfair termination. On the contested award of leave, the trial court while acknowledging the letter by the claimant dated 30th March 2019 to sell his leave days noted that there was no record on leave of the outstanding leave days and how many leave days were sold or left.
33. The court on re-evaluation of the evidence before the trial court, found that the claimant never admitted to the theft, there was no prove of any policy or clause in his contract of service of the surcharge and no disclosure of the cost of the stolen items. The court agreed with the trial court that even the number of leave days was not accounted for. The court further found that the offer by the claimant was not accepted. An offer ought to be accepted for it to be valid. Taking into account the foregoing and the fact that the stolen goods belonged to a third party who had not made a demand on actual cost of the goods, the court found that the appellant had no basis to withhold the statutory leave days from the claimant. The court upheld authority in *Joseph Makau Munyao & 4 others v Kenya Ports Authority & another* [2016] KEELRC 1692 (KLR) where the court found surcharge (though anchored in the employment contract) was arbitrary as the loss and the specific amount was neither pleaded nor proved. The court was of the position that surcharge should be in the form of a special damage and the loss or damage should be quantified and be proved. The surcharge on employee's statutory dues cannot be arbitrary and at the whims of the employer. Due leave days are a vested property of the employee and cannot be denied without justification. The court finds the trial court did not err on the award of leave days in lieu.



On salary for March and April 2019

34. Similarly, as per the facts outlined above, the court finds that the offer for the deduction of salary was not accepted by the appellant. The claimant resigned on 12th April 2019 and the same was upheld by the trial court. How then could the respondent claim salary for entire of April when he resigned on 12th? The employer accepted the resignation on even date (page 34 of ROA). The court finds that after date of resignation and acceptance, there was no employer- employee relations, and the claimant was only entitled to March salary and 12 days in April and to that extent, the court on first appeal found the trial court was in error of fact in awarding entire salary for April. The trial court held the monthly salary was Kshs. 16700. Thus the award is disturbed as follows:-

March salary Ksh. 16700

April salary (12/30x 16700) Kshs 6680

Total unpaid salary was thus Kshs. 23380.

Conclusion

35. The appeal was barely successful on a technical error on days worked in April 2019 being 12 and not the entire month, the claimant having resigned on 12th April 2019 and his resignation accepted even date. Consequently, the Judgment and Orders of the Honourable R.L. Musiega (SRM) delivered at Nairobi on the 1st of December, 2023 in MCELRC No. E380 of 2022 is set aside and substituted as follows:-

Judgment is entered for the claimant against the respondent as follows-

- a. Annual leave pay in lieu Kshs. 33,400
- b. Unpaid March and 12 days in April salaries Kshs. 23,380.
Total sum of Kshs 56,780 with interest at court rate from date of judgment.
- c. Costs of the suit.

36. To temper justice with mercy taking into account the appeal succeeded only on account of marginal technical error , the court ordered each party to bear own costs in the appeal.

37. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF MAY, 2025.

J.W. KELI,

JUDGE.

In The Presence of:

Court Assistant: Otieno

Appellant: - Sala

Respondent:- Achola h/b Odhiambo

