



**Rily Falcon Security Services Limited v Mwachiti (Appeal
E075 of 2024) [2025] KEELRC 1471 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1471 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E075 OF 2024**

**K OCHARO, J
MAY 22, 2025**

BETWEEN

RILY FALCON SECURITY SERVICES LIMITED APPELLANT

AND

JUMA SAID MWACHITI RESPONDENT

*(Being an Appeal from the Judgment of Honourable N. Akee Reuben, Senior Resident
Magistrate of 25th March 2024 in Mombasa CMELR Cause No—E 025 of 2022)*

JUDGMENT

Introduction

1. By a memorandum of appeal dated 24th April 2024, amended on 11th October 2024, the Appellant assailed the above-mentioned judgment of the Lower Court, setting out 10 grounds of appeal. However, the grounds can be condensed and considered under two broad issues:
 - i. Did the Learned Trial Magistrate err in holding that the Respondent's employment was procedurally and substantively unfair?
 - ii. Whether the Respondent was entitled to the reliefs granted by the Learned Trial Magistrate.
2. This appeal was canvassed by way of written submissions pursuant to the directions of this Court.

Respondent's case before the Lower Court.

3. Through a Memorandum of Claim dated 9 December 2021, the Respondent sued the Appellant, claiming that he was an employee of the latter at all material times. Due to a non-conductive work environment, he was forced to quit. Thus, he was constructively dismissed.
4. He sought the following reliefs against them:



- i. A declaration that the termination of his employment was unfair.
 - ii. Compensation for unlawful termination, KShs. 201,056.88
 - iii. Unpaid overtime [121.30 x1 hour x30 days x 44 months], KShs. 160, 116.00.
 - iv. Service pay KShs.16,754.74 x 74/2x3, KShs. 25, 132.11
Total KShs. 410, 701.63
5. It was his case that he first came into the employment of the Appellant as a day Security Guard on 1st April, 2017, at a basic monthly salary of KShs. 16, 754.74.
 6. During his employment, the Appellant's Supervisor, Mr. Morara, began frustrating him by assigning and re-assigning him day and night duties without allowing him to rest as required by law. As a result of this manner of work, he started developing health problems.
 7. He complained on several occasions to the supervisor that it was becoming increasingly difficult for him to work day and night, yet the supervisor instructed him to continue doing so and gave him the option to resign if he could not.
 8. Due to the frustration, he issued a resignation letter. In the letter, he expressed frustration with the Appellant's failure to address his grievances.
 9. He further asserted that during his employment, he diligently and zealously carried out his duties until 10 December 2020, when his employment was terminated without adherence to the laid-down procedure and without being accorded a fair hearing.
 10. Throughout his service with the Appellant, he was not allowed to take his annual leave.

The Appellant's Case before the Lower Court.

11. The Appellant resisted the Respondent's case by its Statement of Response dated 23rd June 2022. It denied the Respondent's cause of action and entitlement to the reliefs sought. At the hearing, it presented two witnesses to testify on its behalf. The 1st witness was Elijah Cheruiyot, its branch Manager, Mombasa, and Mathew Esatina Papa, a handwriting expert. The 1st witness adopted his witness statement as his evidence in chief.
12. The 1st witness [RW1] stated that the Respondent was employed as a security guard by the Appellant from April 2018, when he voluntarily resigned.
13. The Respondent was engaged on successive fixed-term contracts from April 2018 to April 2019, May 2019 to May 2020, and August 2020 to August 2021.
14. Contrary to his assertion, the Respondent was not dismissed from employment, but he ended his employment by resignation. He didn't give any termination notice.
15. The appellant compensated him for all those times he worked overtime and on public holidays. His documents presented as exhibits are a testament.
16. The Respondent was at all material times a member of the National Social Security Fund, for whom remittances were made regularly. Consequently, the remedy of service pay wasn't available to him.
17. The compensatory award sought by the Respondent was unavailable to him as his employment was not unfairly terminated.



18. The 2nd witness asserted that he examined the resignation letter as against his known signature and handwriting, on instructions from the Appellant, and concluded that the author of the resignation letter was the Respondent. He produced his report before the trial Court.

The Trial Court's Judgment

19. After hearing the Parties' respective cases, the Learned Trial Magistrate rendered a judgment on the matter through her Judgment dated 25th March 2024. She held that the termination of the Respondent's employment was procedurally and substantively unfair. Consequently, she awarded him service pay as was sought, and general damages of KShs—150,000 as compensation for unlawful and unfair termination.

The Appeal

20. Aggrieved by the Learned Trial Magistrate's Judgment, the Appellant initiated the instant appeal, setting forth the number of grounds of appeal mentioned hereinabove.

Analysis and Determination

21. It is now a well-established principle that the role of a first appellate court in an appeal involves re-evaluating the evidence that was presented before the trial court and arriving at its own independent findings and conclusions. This position was articulated in the case of *Selle v. Associated Motor Boat Co.* [1968] EA 123, wherein the court held:

“An appeal to this Court from a trial by the High Court is by the 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 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 demeanour 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)”.

22. Before I delve into the two broad issues identified herein for determination, I must point out that the Respondent's pleadings were not articulated clearly. One could not easily discern that the Respondent's case was based on the doctrine of constructive dismissal, which, by its nature, is unrelated to the principles of procedural fairness.
23. However, a thorough evaluation of the Respondent's submissions to the trial court reveals that they were entirely focused on the doctrine of constructive dismissal and its relevance to the matter.
24. Surprisingly, the Learned Trial Magistrate did not interrogate the Respondent's claim as a constructive dismissal claim but considered it an unfair termination claim. Consequently, the Magistrate invoked the provisions of sections 43, 45[2], and 47[5] of the *Employment Act*, which are irrelevant in claims for constructive dismissal. These provisions apply when the termination of an employee's employment is at the employer's initiative, unlike constructive dismissal, which the employee initiates.
25. In light of the foregoing, the judgment rendered by the learned trial magistrate was entirely erroneous, based on an issue [unfair termination of employment] that had not been presented before her. It is hereby set aside.



26. The Respondent's submissions presented before this Court indicate that, according to him, the claim before the trial court concerned constructive dismissal.
27. I express my sympathy towards him. While it is apparent that the Trial Magistrate rendered a Judgment in his favour based on a flawed premise, the Respondent did not cross-appeal against the Judgment, thereby precluding this Court, as a first appellate court, from reviewing the materials presented before the trial court and assessing whether the resignation could constitute sufficient grounds for a successful claim of constructive dismissal.
28. I note the Learned Trial Magistrate's statement to the effect that even for a moment she was to find that the Respondent resigned, she would still hold that there was an unfair termination of employment, as the Appellant didn't demonstrate that it accorded him a hearing. This statement is erroneous. It ignores the fact that resignation is one way that an employment relationship is terminated at the initiative of the employee, and therefore, the applicability of procedural fairness doesn't find a place. The employer can only accept the resignation.
29. Given the circumstances, the appropriate and just course of action for this Court is to mandate a retrial of the Respondent's suit before a Magistrate other than Hon. Noelyne Akee Reuben.
30. Orders accordingly.

READ, DELIVERED AND SIGNED THIS 22ND DAY OF MAY 2025.

OCHARO, KEBIRA.

JUDGE

In the presence of:

Ms. Njenga for the Appellant.

Ms. Ogolla for the Respondent

