



**Walumoli v Securex Agencies (K) Limited (Employment and Labour Relations Appeal E142 of 2023) [2025] KEELRC 1341 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1341 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E142 OF 2023**

**JW KELI, J**

**MAY 9, 2025**

**BETWEEN**

**ELVIS MASETE WALUMOLI ..... APPELLANT**

**AND**

**SECUREX AGENCIES (K) LIMITED ..... RESPONDENT**

*(Being an Appeal from the judgment of Hon. Mr. Rawlings Liluma Musiega delivered on the 14th day of July 2023 in the Milimani Commercial Chief Magistrate's at Nairobi in Employment and Labour Cause No. E005 of 2021)*

**JUDGMENT**

1. The Appellant herein, Elvis Masete Walumoli, being dissatisfied with the entire judgment delivered by Hon. Rawlings Liluma Musiega dated, signed and delivered on 14th July 2023 in Nairobi MCELRC No. E005 of 2021 filed a memorandum of appeal dated 3<sup>rd</sup> August 2023 seeking for the following Orders:-
  - a) This Appeal be allowed.
  - b) That this Honourable Court do set aside the entire judgment delivered on 14th July 2023 in the Milimani Commercial Chief Magistrate's Court in MCELRC No. E005 of 2021 and be substituted with the orders sought in the Statement of Claim dated 3rd December 2020 filed in the trial court, inter alia:
    - i. A declaration that the Appellant suffered unfair wrongful and unlawful dismissal from employment.
    - ii. One month's salary in lieu of notice.....Kshs. 26,688.00



- iii. Salary for the month of September 2020 and 5 days in October 2020.....Kshs. 31,820.31
  - iv. Overtime..Kshs. 1,300,002.13. Normal working hours 52 hours per week the appellant worked 72 hours a week (1/225\*26688\*20hours\*4weeks\*137months)
  - v. Compensation for wrongful, unfair and unlawful dismissal of employment calculated as twelve months gross salary being 12x26,688.....Kshs. 320,256.00
  - vi. Service Pay 26,688x1/2x1years.....Kshs. 146,784.00
  - viii. Cost of the Claim before the trial court and interest.
  - x. Interest on (ii)-(viii) above from the date of filing the suit until payment in full at court's rate.
- c. Cost of this Appeal be borne by the Respondent.

### **Grounds of appeal**

2. That the Learned Magistrate erred in law and in fact by failing to consider the Statement of Claim, testimony, evidence and submissions of the Appellant in support of his Claim and/or the submissions of the learned counsel for the Appellant by finding in favour of the Respondent.
3. That the Learned Magistrate erred in law and in fact by finding that the Respondent had a valid reason to terminate the Appellant from his employment.
4. That the Learned Magistrate erred in law and fact by finding that the Appellant's termination was lawful and justified yet the Respondent's actions were premised on wrong reasons and the assumption that the Appellant had received the show cause letter.
5. That the Learned Magistrate erred in law and in fact in failing to find that the Respondent had not tabled any evidence to prove that the show cause letter was indeed served upon the Appellant in the month of June 2020, to warrant his dismissal.
6. That the Learned Magistrate erred in law and in fact in finding that Appellant was summarily dismissed on the 15th June 2020 following the failure to Honour the notice to show cause letter dated 8th June 2020 which letter has since not been established whether it was indeed served upon the Appellant or not.
7. That the Learned Magistrate erred in law and in fact in failing to find that the due procedure was not followed by the Respondent while terminating the Appellant.
8. That the Learned Magistrate was extremely biased against the Appellant and disregarded the submissions made by the Appellant in the written submission dated 6th April 2023.

### **Background to the appeal**

9. The appellant filed a statement of claim before the Magistrate's court seeking for the following orders:-
  - i. A declaration that the Appellant suffered unfair wrongful and unlawful dismissal from employment.
  - ii. One month's salary in lieu of notice.....Kshs. 26,688.00



- iii. Salary for the month of September 2020 and 5 days in October 2020.....Kshs. 31,820.31
  - iv. Overtime..Kshs. 1,300,002.13. Normal working hours 52 hours per week the appellant worked 72 hours a week (1/225\*26688\*20hours\*4weeks\*137months)
  - v. Compensation for wrongful, unfair and unlawful dismissal of employment calculated as twelve months gross salary being 12x26,688.....Kshs. 320,256.00
  - vi. Service Pay 26,688x1/2x1years.....Kshs. 146,784.00
  - vii. costs of the suit (page 1-20 of ROA was the claim, witness statement and documents by claimant. Reply to response and submissions )
9. The claim was opposed by the respondent who filed respondent's statement of response, its documents witness statement , bundle of documents and submissions (page 105-132 of ROA was the respondent's case).
  10. The claimant's case was heard on the 13<sup>th</sup> February 2023 where he adopted his witness statement dated 3<sup>rd</sup> December 2020 as evidence in chief, produced his documents, and was cross-examined by counsel for respondent, Mr. Wathuta and re-examined by his counsel Atema.
  11. The respondent's case was heard on the 13<sup>th</sup> March 2023 where RW1 was Purity Kageha Kule. RW1 adopted her witness statement dated 14<sup>th</sup> March 2022 as her evidence in chief and produced the respondent's filed documents. She was cross-examined by counsel for the claimant Ms. Kyeva and re-examined by Mr. Wathuta. (proceedings at pages 142-158 of ROA)
  12. The trial court delivered its decision on the 14<sup>th</sup> July 2023 where it found the dismissal substantially fair but lacking procedural fairness. the trial court awarded the appellant one-month notice pay, order of certificate of service. The trial court ordered each party to bear own costs of the suit(pages 134-141 of ROA was the judgment).

### **Determination**

13. The appeal was canvassed by way of written submissions. Both parties complied.
14. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co. Ltd* [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."
15. The court on first appeal is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation 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

16. The appellant identified the following issues for determination on the appeal:-
- i. Whether the Learned Magistrate erred in law and in fact in finding that the Respondent had a valid reason to summarily dismiss the Appellant;
  - ii. Whether the Learned Magistrate erred when he failed to make a determination on the issue as to whether the Appellant was terminated in accordance with fair procedure given that there was no single piece of evidence tabled before the Honourable court proving service of the show cause letter to the Appellant as alleged by the Respondent;
  - iii. Whether the Learned Magistrate erred by finding that the Claimant was not entitled to some of the reliefs sought.
17. The Respondent identified the following issues for determination on the appeal:-
- a. Whether the Learned Magistrate erred in law and in fact in finding that the Respondent had a valid reason to summarily dismiss the Appellant.
  - b. Whether the Learned Magistrate erred when he failed to determine the issue as to whether the Appellant was terminated in accordance with fair procedure
18. The court, on perusal of the written submissions by the parties and the grounds of the appeal of was of the considered opinion that the issues placed by the parties at the appeal for determination by the court were:-
1. Whether the trial court erred in its findings on the fairness of the termination
  2. Whether the appellant was entitled to the reliefs sought

## Whether the trial court erred in its findings on the fairness of the termination

19. The court read the submissions of the parties. The court found no contest that there was no hearing before termination and no evidence of service of letter of termination. The letter was received at labour office 16<sup>th</sup> September 2020. The evidence of the claimant was to effect on change of his shift to day he was aggrieved and opted to stay away to take care of wife (maternity). Upto that point there was evidence of absconding duty and reason for termination. Indeed, the claimant in his letter dated 5<sup>th</sup> October 2020 admitted to have known his employment had been terminated attributing the same to COVID 19. (page 124 of ROA) However, vide same letter the claimant stated he was recalled to work and reported to duty and worked month of September from 1<sup>st</sup> at Brookside Villas and his salary was not paid. In October he was moved to man Jambo Village. He visited the office to inquire of his salary arrears only to be issued with the dismissal letter.
20. The Respondent's witness(RW) told the trial court, during cross-examination, that they had computed the salary for September and 5 days worked in October for the claimant but he had not picked(Page 156 of ROA). There is no doubt in my mind this evidence corroborates the statement by claimant that he returned to work in September 2020 and was not paid. The return to work and working in September defeated the absconding defence. The trial court erred by not making a finding on the admission by RW. The employer could have produced records to show that the claimant was not at work in the specific places he mentions in the months of September and October as the custodian of records. The claimant proved is case as per section 47(5) of the *Employment Act* and the burden shifted to the Respondent to demonstrate otherwise.



21. Consequently, the decision is overturned and termination held as unfair for lack of procedural fairness and further the reason for termination was not valid the respondent having admitted to have computed the salary of September and October 5 days which was admission of the claimant being at work as pleaded. The court found that the defence of having issued dismissal letter to the claimant in June 2020 was defeated by fact of allowing him to work in September. The termination is held as unfair.

#### **Whether the claimant is entitled to reliefs sought in claim Compensation for unfair termination**

22. The termination having been held as unfair for lack of valid reasons and procedural fairness Compensation is awarded under section 49 of the *Employment Act* the equivalent of for 10 months taking into account the claimant's conduct of having been away from work on change of shift obviously without permission and the long length of service from 2009 to 2020 for the sum of Kshs. 266, 880/=.

#### **Overtime claim**

23. RW stated overtime payment was reflected in the salary payslip. The court noted a constant item of Monthly OT in the payslips (Pages 12-15 of ROA). The court believed the RW testimony that this was overtime as it was not disputed by the Appellant/claimant. The payslip had item of basic salary and housing allowance. This item could only have been overtime and it is so found on balance of probabilities.

#### **Service pay.**

24. The trial court noted that there was no evidence of remittance of NSSF. That was an erroneous conclusion by the court. The evidence before the trial court was the payslip which had NSSF deductions. The claimant did not provide evidence from NSSF to dispute the deductions and remittance. Section 35(6) of *Employment Act* on employer being enrolled under NSSF and the claimant having been deducted the Service Pay was not payable. Any dispute on the remittance of dues should be filed with NSSF which is the regulatory body.
25. Notice pay for one month salary is upheld as granted by the trial court of Kshs. 26688 there being no cross-appeal.
26. Salary arrears- RW admitted they had computed Salary arrears for month September and 5 days in October and the same is awarded for the sum of Kshs. 31820.0

#### **Conclusion**

27. The appeal is allowed. The judgment of Hon. Mr. Rawlings Liluma Musiega delivered on the 14<sup>th</sup> day of July 2023 in the Milimani Commercial Chief Magistrate's at Nairobi in Employment and Labour Cause No. E005 of 2021 is set aside and in place substituted as follows:-
- a. A declaration that the Appellant suffered unfair wrongful and unlawful dismissal from employment.
  - b. One month's salary in lieu of notice.....Kshs. 26,688.00
  - c. Salary for the month of September 2020 and 5 days in October 2020...Kshs. 31,820.31
  - d. Compensation for wrongful, unfair and unlawful dismissal of employment equivalent of 10 months' salary 10x26,688.....Kshs. 266,880
- Total sum awarded Kshs. 325,388.31



- e. Interest on the total awarded sum from the date of judgment until payment in full at court's rate.
  - f. Costs of the suit.
28. Cost of this Appeal be borne by the Respondent.
29. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY , 2025.**

**J.W. KELI,**

**JUDGE.**

In the presence of:

Court Assistant: Otieno

Appellant : -Absent

Respondent:- Ms. Mengich

**FURTHER COURT ORDER**

Stay of 30 days granted.

**J.W. KELI,**

**JUDGE.**

