



**Digital Security Services Limited v Angatia (Appeal E168 of 2024)
[2025] KEELRC 1929 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1929 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E168 OF 2024**

**M MBARŪ, J
JUNE 30, 2025**

BETWEEN

DIGITAL SECURITY SERVICES LIMITED APPELLANT

AND

IBRAHIM MOI ANGATIA RESPONDENT

*(Being an appeal from the judgment of Hon. H. Adika delivered
on 9 July 2024 in Mombasa CMELRC No. E357 of 2023)*

JUDGMENT

1. The appeal arises from the judgment delivered on 9 July 2024 in Mombasa CMELRC No. E357 of 2023. The appellant seeks that the judgment be set aside, discharged or varied.
2. The grounds of appeal are that;
 1. The learned magistrate erred in law and fact by failing to appreciate the period of employment during which the appellant engaged the respondent, thereby arriving at wrong calculations and conclusions in its entire judgment.
 2. The learned magistrate erred in law and fact by disregarding the evidence and inferences from the evidence produced, thereby arriving at a wrong conclusion in the judgment.
 3. The learned magistrate erred in law and fact by granting awards/dues without evidence in support of them, totalling Ksh 536,044.95.
 4. The learned magistrate erred in law and fact by regarding issues he ought to have disregarded and disregarding issues he should have considered.
3. The respondent's claim before the trial court was that he was employed as a day guard by the appellant at a basic wage of Ksh. 7,000 per month. He worked from June 2018 to April 2022. On 22 March



2022, the respondent reported to work, and Khamis, the supervisor, informed him to report to the head office for a meeting with the director, Sylvester. The respondent did as directed, yet the director was not in the office, and he went back to his supervisor. He was informed not to report to work until he met the director. On 1 April 2022, the director told the respondent that he would be transferred to another site, yet no details were given. Despite several reports for posting, nothing was done. He was verbally informed that his employment had been terminated.

4. The claim was that Ksh underpaid 7,000 per month instead of Ksh.13,372.90. There was an unfair termination of employment without payment of terminal dues. The respondent claimed the following:
 - a. Salary arrears for February 2022 Ksh.13,572.90,
 - b. Salary arrears for March 2022 Ksh.13,572.90,
 - c. Notice pay ksh.13,572.90,
 - d. Accrued leave for 63 days ksh.32,888.18,
 - e. Underpayments for 47 months Ksh.308,926.30,
 - f. Service pay for 4 years Ksh.31,322.07,
 - g. 12 months compensation Ksh.162,874.80,
 - h. Certificate of service,
 - i. Costs of the suit.
5. In response, the appellant's case was that the respondent was employed as a day guard on 3 July 2018 and worked until 28 February 2018 when he deserted duty. He reported back on 2 February 2020 for a new posting and was issued a contract. His employment was based on a contract the appellant had with Slapper Shoe Industries Limited, hence the rate of Ksh. 000 per month. The respondent continued to be absent from work and eventually deserted duty on 21 April 2020. His employment was terminated by operation of law due to desertion. He did not give notice, thus violating section 41 of the *Employment Act*, and therefore cannot claim unfair termination of employment.
6. The appellant further responded that they paid the respondent Ksh. 7,000 per month based on a service contract, which he accepted and signed. The claim for underpayments is based on incorrect assumptions and is unrealistic. Following reports from the warehouse manager about missing items where the respondent was placed to guard, he was presumed to be involved, and when questioned, he failed to report to work. The absence from work from April 2020 amounted to a breach of the employment contract, which justified summary dismissal. The claims made are without merit and should be dismissed with costs.
7. The respondent was paid all his dues, and the only outstanding payment is his wage for April 2020, Ksh. 4,900, due upon clearance. The certificate of service is ready for collection.
8. The learned magistrate heard the parties and, in judgment, held that there was unfair termination of employment. Hence, the respondent was awarded his claims with costs and interests from the date of judgment.
9. On the appeal, the appellant argued that the trial court overlooked the evidence showing that the respondent was first employed from 3 July 2018 to 28 February 2019, when he deserted his duty. He was then employed again from 22 February 2020 to 3 April 2022, during which he also deserted his



- duty. There was no continuous employment, which was not considered in the trial court's judgment. The total period of employment under the last contract was 22 months, not 46 months.
10. The appellant argued that the respondent's desertion of duty terminated his employment by operation of law. He cannot claim unfair dismissal, and the awards regarding this matter were not justified.
 11. The appellant submitted that in the case of *Galaxy Paints Company Limited v Falcon Guards Limited* Appeal No. 219 of 1998, the court held that parties are bound by their pleadings. The evidence submitted by the parties was not applied. The court's awards should be set aside.
 12. There are no submissions by the respondent.

Determination

13. This is a first appeal. The court is required to review, reevaluate, and reassess the entire record and draw its conclusions. However, it is essential to note that the trial court had the opportunity to hear the parties testify in court.
14. The respondent argued that he was employed as a day guard from June 2018 to April 2022, when the appellant unfairly terminated his employment. The appellant disputed these facts and maintained that they employed the respondent during different periods.
15. The appellant submitted a contract dated 2 February 2020. The respondent was employed as a guard on a monthly wage of Ksh.7, 000.
16. The employment contract is not denied.
17. In his Reply to the Memorandum of Reply, the respondent asserted that he remained in continuous service with the appellant from June 2018 to April 2022. However, no employment contract was produced before the one dated 2 February 2020.
18. Under section 10(3) of the *Employment Act*, an employer is permitted to issue a written contract of employment, which forms the foundation of the employment relationship. The court is obliged to adhere to the written terms of employment.
19. In this case, the contract of service dated 2 February 2020 bound the parties.
20. The appellant's case is that the respondent deserted duty from 21 April 2022 and hence effectively terminated his employment by operation of the law. However, there is no notice terminating employment. Such must be issued by the employer, particularly where the employee is alleged to have deserted or absconded from duty.
21. In the case of *Wangereka v Rupra* [2023] KEELRC 625 (KLR), the court held that desertion, absenteeism, and abandonment of duty constitute gross misconduct. An employee who absents themselves from duty without lawful cause and without the employer's permission is liable for summary dismissal. While mere absenteeism from work may not constitute desertion, an employee who leaves employment without the employer's permission and with no intention of returning is regarded as having deserted. Such an employee is deemed to have committed an act of gross misconduct under section 44 of the *Employment Act*.
22. However, in either case, the employer, as the offended party, must take a proactive step and assert its rights under sections 44 and 41(2) of the *Employment Act*. The employer must issue a notice to the employee and, where there is no attendance, issue a notice terminating employment, copied to the Labour Officer.



23. Such notice protects the employer from a claim of unfair termination of employment. The departing employee cannot return and claim unfair termination of employment. In the case of *Luka Mbuvi v Economic Industries Limited* [2020] eKLR, the court held that the employer must demonstrate the efforts made to ensure compliance with the requirements of section 41 (2) of the *Employment Act*.
24. In this case, the appellant took no action regarding the respondent's desertion and abscondment from duty. The claims that he terminated his employment by operation of law contradict sections 44 and 41(2) of the *Employment Act*.
25. By leaving the respondent at large, the appellant failed to apply the law, resulting in unfair employment termination.
26. The award of notice pay and compensation is justified.
27. On the claims for underpayment of wages under the contract dated 2 February 2020, the appellant has admitted that the wage paid was Ksh 7 000 per month based on the service contract with the third party. However, an employment contract cannot be based on illegality. An employer cannot offer an employee a wage below the minimum wage. Such a contract is invalid, whatever the justification.
28. The *Labour Institutions Act* does not allow Parties to contract below the minimum wage given under the various Wage Orders.
29. The respondent was employed as a day guard. His wages were regulated under the law and the Regulations of Wages (Protective Security Services Order) 1998. The contract issued by the Minister allocating a wage below the allowed minimum was invalid.
30. Under the Wage Orders applicable in February 2020, the minimum wage for a day guard is Ksh.13, 572.90.
31. In this case, there was an underpayment of wages by Ksh.6, 572.90.
32. The respondent worked 25 full months from February 2020 to March 2022, and the total underpayment is Ksh.164, 322.50.
33. For April 2022, the 22 days amount to Ksh. 9,952.80.
34. The claim for salary arrears for February and March 2022 is due at ksh.13, 572.90 each month if they are not fully paid.
35. On accrued leave, the appellant did not file any work records allocating annual leave to the respondent for the 25 full months worked. Under section 28(4) of the *Employment Act*, the respondent can claim the due annual leave days up to 18 months, all at 33 days. This amounts to ksh.14, 929.20.
36. On service pay, there is an admission that the respondent was employed as a security guard. Under the Regulations of Wages (Protective Security Services Order 1998), service pay accrues at the end of employment, section 36(6) of the *Employment Act* factored. For the 2 completed years of service, the respondent is entitled to 15 days' pay in service all at ksh.13, 572.80.
37. On this basis, the judgment of the trial court is reviewed as analyzed above. Each party is to bear its costs.
38. Accordingly, judgment in Mombasa CMELRC No. E357 of 2023 is reviewed in the following terms;
 - a. Employment terminated unfairly,
 - b. Compensation Ksh.81,432,



- c. Notice pay Ksh.13,572.90
- d. Salary arrears for February 2022 Ksh.13,572.90 if not paid in full,
- e. Salary arrears for March 2022 Ksh.13,572.90 if not paid in full,
- f. leave pay Ksh 14,929.20,
- g. Underpayments for 25 months Ksh.164,322.50,
- h. Pay for 22 days in April 2022 Ksh.9,952.80,
- i. Service pay for 2 years Ksh.13,572.80,
- j. Certificate of service,
- k. Each party to bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 30TH DAY OF JUNE 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

