



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Total Security Surveillance Limited v Wekesa (Appeal E146 of 2024)
[2025] KEELRC 1930 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1930 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E146 OF 2024**

**M MBARŪ, J
JUNE 30, 2025**

BETWEEN

TOTAL SECURITY SURVEILLANCE LIMITED APPELLANT

AND

JOSEPH SIMUYU WEKESA RESPONDENT

*(Being an appeal from the judgment of Hon. N. R. Akee delivered
on 21 June 2024 in Mombasa CMELRC No. E045 of 2022)*

JUDGMENT

1. The appeal arises from the judgment delivered on 21 June 2024 in Mombasa CMELRC No. E045 of 2022. Aggrieved, the appellants seek that the judgment be set aside and the claims allowed as set out in the Memorandum of Claim with costs.
2. The background of the appeal is that the appellant employed the respondent in March 2018 as a night security guard in Mombasa at Ksh. 700 per month. He worked until 12 January 2022, when the operations manager, Towet, directed him to hand over his duties and his employment was no longer needed. No reasons were given, nor was notice provided to answer any allegations. He claimed that he never took his annual leave, worked overtime, and was underpaid at Ksh. 11,700 instead of Ksh. 15,141.95, and was not paid a house allowance. He claimed as follows;
 - a. Notice pay Ksh.15,141.95,
 - b. Underpayments for 46 months Ksh.158,329.70,
 - c. House allowance for 46 months Ksh.104,479.46,
 - d. Unpaid leave for 3 years Ksh.45,772.65,
 - e. 12 months compensation Ksh.181,703.40,



- f. Unpaid overtime Ksh.188,439,
 - g. Service pay for 3 years Ksh.22,712.93,
 - h. Costs of the suit.
3. In reply to the claim, the appellant filed Notice of Preliminary Objections that the respondent had no locus standi to file the claim, hence fatally defective.
4. The response was that the appellant employed the respondent on 1 March 2018 under a one-year renewable contract as a day security guard. His last contract was renewed on 1 March 2021 for a year. He worked until 12 January 2022, when he resigned and earned a consolidated wage of Ksh. 609, inclusive of house allowance. The wage paid was in accordance with the Wage Orders published by the Minister, and he was registered for NSSF and NHIF, had a weekly day off, went on annual leave, and there are work records to that effect, and he observed all public holidays. Work hours were eight per day, and any overtime was compensated. There was no unlawful termination of employment as alleged; he deserted duty without notice, and the claims made are unjustified.
- The appellant filed work records.
5. The trial court listened to the parties and in its judgment determined that there was an unfair termination of employment and awarded damages as follows;
- a. 3 months compensation Ksh.132,953.40,
 - b. Underpayment for 46 months Ksh.86,153.40,
 - c. Costs of the suit.
6. Aggrieved by the judgment, the appellant raised 16 grounds that the trial court erred in finding that the procedure adopted in terminating employment was in error and hence applied the wrong principles. The finding that the appellant was liable for claims arising out of the respondent's resignation was in error, and therefore, the award of notice and compensation is not justified.
7. Other grounds of appeal are that the claims for leave pay and underpayments were without proof and should have been dismissed. Upon his resignation, the respondent should have paid for notice. In essence, the awards aided the respondent towards unjust enrichment for unlawful absconding of duty, and the judgment should be set aside.
8. The appellant submitted that the appeal should be allowed as the trial court held that no reason was given for the termination of employment, despite evidence of the respondent's resignation.
9. The appellant filed an Amended Response and submitted evidence of the respondent's resignation, which was not considered. The appellant employed the respondent on term contracts renewed annually, and he was on his last contract, dated 1 March 2021, when he resigned without notice. Such a unilateral resignation was without notice or payment in lieu of notice.
10. The appellant submitted that there was evidence that the respondent was paid ksh.15, 609 and not Ksh.11, 700 as alleged. He was on NSSF and NHIF cover, went on annual leave upon application, and was allowed to observe public holidays. Work hours were 8, and where there was overtime, it was compensated.
11. There was no termination of employment as alleged; the respondent resigned without giving notice.



12. The alleged underpayment was incorrect since the appellant paid in terms of the Wage Orders for a day guard at Ksh.15, 609.
13. The employer has a right to dismiss the employee who is absent from duty under section 44(4)(a) of the *Employment Act*, subject to meeting the provisions of Section 41(2) of the Act as held in Prof. Macha Isindu v Lavington Security Guards Limited [2017] eKLR and in the case of Roadtainers Mombasa Limited v Choga Tsuma ELRCA E078 of 2024.
14. In this case, the respondent resigned on 12 January 2022. This was not a case of summary dismissal, as alleged. During the hearing, the respondent did not challenge the letter of resignation, and the trial court erred in shifting the burden of proof that there was unfair termination of employment. The evidence of resignation was ignored.
15. The appeal is with merit and should be allowed with costs as held in Jackson Muiruri Wathigo t/a Murton Supermarket v Lilian Mutune [2021] eKLR.
The respondent did not file any written submissions.

Determination

16. This being a first appeal, the court must consider the evidence adduced before the trial court, evaluate it and draw its conclusions, bearing in mind that the trial court had the opportunity to hear and see the witnesses who testified. See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123.
17. The respondent claimed that he was employed as a night guard and did not sign any contracts or tender a resignation. The records show that he neither signed them nor received more than Ksh. 11,700 per month paid through KCB Bank. He disavowed the signature on the resignation letter and maintained that he did not sign the contracts submitted.
18. The appellant filed a response to the claim and an Amended Response. Despite being served, the respondent has not responded to the same.
19. Under sections 10(6) and (7) of the *Employment Act*, the employer must file work records. In this case, the work records, including the employment contracts and notice of resignation, were filed before the hearing commenced. The respondent did not challenge these records until the hearing date.
20. Under Rule 14 of the Employment and Labour Relations Court (Procedure) Rules, 2014, which were applicable at the time the respondent filed his claim before the trial court, upon being served with the response and the amended response, where the respondent found the records manipulated and not correct, if at all, he had a right of reply. He did not apply this right.
21. The court must believe the records submitted by the employer, the appellant.
22. The respondent was employed under term contracts, the last signed on 1 March 2021.
23. The respondent resigned from his employment through notice dated 12 January 2022.
24. Upon his resignation due to focusing on personal issues, forcing him to remain at work beyond such notice would amount to slavery and servitude, which is contrary to Article 30 of *the Constitution* and Sections 5 and 6 of the *Employment Act*, as held in *Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited* [2015] KECA 376 (KLR) and in the case of *Eunice Njeri Wambugu & 5 others v County Public Service Board, Kirinyaga County* [2020] KEELRC 1316 (KLR). The court has held that upon an employee's resignation, the option is to serve the notice period for pay in lieu thereof.



Otherwise, the employee cannot be held back against his will. Unless the employer waives the notice period under section 36 of the *Employment Act*, resignation without notice is irregular. See *Mwaniki v Tihan Limited* (Cause E403 of 2020) [2025] KEELRC.

25. In this case, the respondent voluntarily terminated his employment with the appellant upon his resignation on 12 January 2022, before the end of his term contract on 28 February 2022. He cannot seek notice pay or compensation.
26. The learned magistrate erred in failing to delve into these facts and address the notice dated 12 January 2022 on its merits and import, including the term contracts filed by the appellant.
27. On the claims for house allowance, underpayment, overtime, and leave pay for 46 months, based on the contracts submitted by the employer, the respondent was earning Ksh.15,609 and not Ksh.11,700 as alleged. The payment statements submitted by the employer confirm the wages paid per month. This is consistent with section 20 of the *Employment Act*.
28. In January 2022, a day guard working in Mombasa earned a minimum wage of Ksh . 13,572.90 plus a house allowance of Ksh . 2,035.80, for a gross pay of Ksh . 15,607.80.
29. On this basis, there is no underpayment, and the house allowance includes the wage paid.
30. The appellant filed the work attendance sheets for overtime. In May 2021, the general reporting time was 6 a.m. to 4 p.m., with a variance of 5 minutes. This record is replicated in November 2021 and January 2022. There was no overtime work.
31. The worksheets submitted also confirm that the respondent took his rest days.
32. On the claim for annual leave for 3 years, there is a record of the respondent taking 26 leave days from 10 April to 9 May 2020, 19 days from 28 April 2021, and 7 days from 21 to 27 April 2021. The leave days were entirely spent.
33. On the claim for service pay, the appellant admitted that the respondent was a day guard. Under the Regulation of Wages (Protective Security Services) Order, 1998, the sector negotiated terms and conditions of service, including payment of service/gratuity at the end of employment. However, under section 35(6) of the *Employment Act*, the payment of statutory dues to NSSF and NHIF insulates the employer from paying gratuity under the Wage Orders to avoid double payment.
34. The rationale is that contributing to the NSSF ensures that the employee receives social protection in retirement. Therefore, when the employer has chosen to contribute to this Fund on behalf of the employee, it would be considered double compensation to require the employer to make additional payments towards the employee's social protection. Consequently, this is excluded under section 35(6) of the *Employment Act*, as upheld in *Alsaidco Alarm Limited v Njeru* [2023] KECA 1127 (KLR). This stance is reaffirmed in *Muchiri v Security Guards Services Limited* (Employment and Labour Relations Appeal E108 of 2021) [2024] KEELRC.
35. On this basis, the appeal has merit. The question of costs sought is justified.
36. Accordingly, the Judgment in Mombasa CMEELRC No. E045 of 2022 is hereby set aside. The appellant is awarded the costs of the appeal.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 30 JUNE 2025.

M. MBARŪ

JUDGE



In the presence of:

Court Assistant: Japhet

..... and

