Riley Falcon Security Services Limited v Wepukhulu (Appeal E133 of 2023) [2025] KEELRC 1790 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1790 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E133 OF 2023

K OCHARO, J

JUNE 12, 2025

BETWEEN

RILEY FALCON SECURITY SERVICES LIMITED ..... APPELLANT

AND

ANTHONY WASWA WEPUKHULU ..... RESPONDENT

(Being an Appeal against the Judgment and Decree of Honourable Maureen Nabibya [PM], Mombasa CMELRC CAUSE No. 165 of 2021)

JUDGMENT

Introduction

1. The appeal herein, which has been initiated vide a Memorandum of Appeal on 30th November 2023, assails the Judgment of the Honourable Principal Magistrate in the cause mentioned above, putting forth principal grounds that he erred in law and fact;

    a. The learned Magistrate erred in law and fact in holding that it was not in dispute or alternatively that it was not denied by the Appellant that the Respondent had sought a few days off yet the same was clearly denied by the Respondent in the Amended Statement of Response and the Witness Statement of the Respondent's Witness RW1.

    b. The learned Magistrate erred in law and fact in holding that the Respondent proved that he had been assaulted by the Appellant's staff.

    c. The learned Magistrate erred in law and fact in holding that the Appellant did not provide evidence that the Respondent had been summoned to the Appellant's offices yet the evidence was in black and white in the Respondent's documents.

    d. The learned Magistrate erred in law and fact in holding that there was no communication issued to the Claimant regarding the allegation made against him of sleeping on duty.

e. The learned Magistrate erred in law and fact in finding that the disciplinary process was marred with irregularities and unfairness.

f. The learned Magistrate erred in law and fact in finding that the Respondent had established a case of constructive dismissal against the Respondent.

g. The learned Magistrate erred in law and fact by failing to consider and fathom the Appellant's documentary evidence and testimony of its witness.

h. The Learned Magistrate erred in law and fact in failing to give weight to, fathom or to consider the Appellant's written submissions and authorities.

i. The learned Magistrate erred in law and fact by finding that the Respondent had proved his case on a balance of probabilities.

j. The learned Magistrate erred in law and fact in finding that the disciplinary process could continue even after the Respondent's resignation.

k. The learned Magistrate erred in law and fact in finding that there was no evidence of the Respondent's act or omissions which contributed to his termination.

l. The Learned Magistrate erred in law and fact in holding that the Respondent's termination was unfair.

m. The learned Magistrate erred in law and fact in failing to find that the prayer for overtime for the last two contracts was time barred because the Respondent was employed on distinct annual fixed term contracts.

n. The learned Magistrate erred in law and fact by failing to find that the prayer for overtime was not credible and was not proved since it had been made for all possible months of work yet the sample payslips had overtime pay.

o. The learned Magistrate erred in law and fact by failing to hold that since the sample payslips produced by the Appellant had overtime pay, awarding overtime for every month for the last 3 years of employment would amount to unjust enrichment and double payment.

p. The learned Magistrate erred in law and fact in awarding the Respondent 12 months' pay in compensation or any compensation at all.

q. The learned Magistrate erred in law and fact in awarding costs and interest to the Respondent.

2. On the above grounds, the Appellant prayed for orders that: -

    1. This Appeal be allowed and the judgment of the lower Court be set aside.

    2. The suit against the Appellant in the lower court be dismissed.

    3. That the Respondent bear the costs of the appeal and the lower court.

3. The Appellant filed a Record of Appeal dated 17th May 2024 and a Supplementary Record of Appeal dated 24th June 2024.

4. When the matter came up for directions on the appeal hearing, this Court ordered the appeal to be canvassed through written submissions and gave timelines for the parties to file their respective submissions. The Parties complied.

The case before the Trial Court

5. It was the Respondent's case that he first joined the Appellant's workforce as a Night Security Guard on 26th March 2011. His monthly salary was KShs. 17,500.

6. He asserted that on February 5, 2021, he requested four days off to attend to his sick daughter, which the Appellant declined to grant.

7. On 9 February 2021, he attended the Appellant's offices to inquire about the Appellant's position on his transfer request. He was not given any satisfactory response. He was only told to return to his station and continue working, as the Respondent didn't have time for his issues.

8. On 15th February 2021, the Appellant's Manager, Mr. Cheruiyot, summoned him to his office and forced him to write a letter explaining why he was late reporting to the office. After writing the letter, the Manager issued him a suspension letter. After issuing him the suspension letter, the Manager and other employees of the Appellant attempted to forcibly remove from him the uniform he was wearing without caring that he didn't have other clothes to change into.

9. When he resisted, they assaulted him. He was prompted to report the matter to the police.

10. He alleged that after the assault, the Manager verbally told him that the Respondent no longer wanted his services. Having been dismissed from employment, he issued the Appellant a termination letter, believing that the dismissal amounted to constructive dismissal.

11. Subsequently, the Appellant prevailed upon him to withdraw the assault complaint, and when he did, the Appellant paid him KShs. 15,000 to cover his medical expenses.

12. He stated that the Appellant didn't allow him to take his annual leave at any time during his tenure. Further, he wasn't paid a house allowance.

13. The Appellant didn't remit NSSF and NHIF contributions to the relevant authorities as required by law.

14. The Appellant asserted that the Respondent's employment was not terminated; rather, he resigned in a letter dated 18 February 2021 after being asked to respond to misconduct allegations.

15. The Respondent was found sleeping while on duty. He was summoned severally to the Respondent's offices regarding the misconduct, but he ignored the summons. Subsequently, he was issued with a show cause letter, to which he responded.

16. His explanation was found to be unsatisfactory. He was invited for a disciplinary hearing. Further, he was put on suspension pending the hearing. He resigned before the hearing could take place.

17. The Appellant denied the Respondent's assertion that he was not allowed to take his leave, alleging that at the time of separation, he didn't have any unutilised leave days or any earned but not utilised leave days. Any leave days that were earned but not utilised were paid for.

18. They dutifully deducted and remitted NHIF and NSSF contributions to the relevant authorities.

The Trial Court's Judgment.

19. After hearing the parties regarding their respective cases, the learned trial magistrate found that the appellant had terminated the respondent's employment irregularly and unfairly, and consequently awarded him compensation for earned but untaken leave days, KShs. 36,729, overtime compensation, 130,650, and compensation for unfair termination of employment, KShs. 210,000. She further

ordered that a certificate of service be issued to the Respondent, and costs of the suit to be borne by the Appellant.

The Appeal.

20. The Appellant, being aggrieved by the decision of the Trial Court, filed the present Appeal on the grounds set out hereinabove.

Analysis and Determination

21. The duty of this Court as a first Appellate Court is to reconsider and re-evaluate the evidence and material that was placed before the trial Court and come to its own independent findings and conclusions. This position was set out elaborately in the case of Selle -vs- Associated Motor Boat Co. [1968] EA 123); see also (Abdul Hameed Saif vs. Ali Mohamed Sholan [1955] 22 E. A. C. A. 270) where the Court held: -

> " An appeal to this Court from a trial by the High Court is by 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 demeanor 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. More recently, the Court of Appeal in The German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) restated the role as follows:

> " We have considered the records for the two appeals, the parties' submissions and the law. This being a first appeal, we are cognizant that our primary role is to re-evaluate the evidence before the ELRC and draw our own conclusions. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court's conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we, unlike the ELRC, we did not have the benefit of seeing the witnesses testify. (See Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212)."

23. Cognizant of this role, this Court has analysed the Appellant's Record of Appeal and takes the view that despite the Appellant's over-split grounds of appeal, the Appellant's appeal succeeds or falls on the following two principal grounds;

    I. How did the separation occur?

II. If the answer to [I] above is that the termination was at the initiative of the Appellant, was the termination fair?

III. Was the Respondent entitled to the reliefs awarded by the trial Court?

24. Before I delve further into the first issue, I find it necessary to point out that the Respondent's case was pleaded in a confusing and misguided manner. On the one hand, the Respondent alleged that his employment was terminated unprocedurally by the Appellant and, on the other hand, claims constructive dismissal. Termination of an employee's employment is either at the employer's or the employee's initiative. It cannot be both. One cannot claim unfair termination [i.e. lacking procedural and substantive fairness]; thus, one is at the employer's initiative, and constructive dismissal, which in its nature arises at the employee's initiative.

25. There is no doubt that the Appellant issued the Respondent with a show cause letter dated 15th February 2021. I note he acknowledged receipt of the same by signing it. On the same day, he responded to the letter and apologised to the Respondent. The Appellant contended that it had suspended him from work pending a disciplinary hearing. The Respondent admits this fact in his witness statement, paragraph *7*, where he stated;

> " After writing the letter on 15/2/ 2021, the Respondent's manager, known as Mr. Cheruiyot and other staff members handed me a suspension letter and forced me to surrender my uniform without minding that I had not carried other clothes to change"

26. Given this, I cannot understand why the trial Court did not interrogate this pivotal issue, and what informed her decision that there was a termination.

27. Section 47[5] placed a burden on the employee [the Respondent] to prove that an unfair termination occurred before the burden could shift to the employer [the Appellant] to demonstrate that the termination was lawful and fair. Had the learned trial Magistrate taken into account that the Respondent was suspended from duty and resigned three days later, she could have concluded that the Respondent did not discharge the legal burden under the provision.

28. Undeniably, the Respondent resigned from his employment by letter, citing that the injuries sustained during the assault, as stated above, prevented him from working any longer. Assaulting an employee and even attempting to strip him naked are acts that could constitute violence and harassment in the workplace, contrary to ILO Convention 190, which could entitle the affected employee to general damages against the employer, and even serve as a basis for the employee to leave his employment and claim constructive dismissal. The tragedy of this matter is that no relief was sought for the harassment and violence in the Respondent's pleadings. Constructive dismissal was poorly pleaded, as mentioned above. The evidence he tendered did not aim at proving the claim.

29. The Respondent resigned from employment. Although the learned trial Magistrate mentioned the resignation in her judgment, it is unclear what her conclusion was.

30. By reason of the foregoing premises, I find that the learned trial Magistrate erred in law and fact when she held that the Appellant unfairly terminated the Respondent's employment.

31. The remedies, compensation for unfair termination under the provisions of section 49[1][c], and notice pay under section 36 of the *Employment Act* are closely tied to claims for unfair termination of employment or wrongful dismissal. Having found that the Respondent's employment did not end at the initiative of the Appellant, and unfairly so, but rather at his own initiative through resignation, it is not difficult to conclude that the two forms of relief were not warranted.

32. The Respondent contended that he worked from 6:00 am to 6:00 pm throughout his tenure. The Appellant did not sufficiently challenge this fact. This implies that his assertion of working twelve hours instead of the statutory eight hours, resulting in four hours of overtime whenever he worked, was not rebutted. Continuous overtime that isn't compensated constitutes a continuous injury under section 90 of the *Employment Act*. The learned trial magistrate did not err in awarding the relief. Apparently, the trial Court didn't relate the doctrine of continuous injury to the circumstances of the matter before her; otherwise, she could have awarded a higher amount. As there was no cross-appeal, I can only uphold the amount awarded.

33. In the disposal section of her Judgment, the learned trial Magistrate held that "severance pay is not awarded as the termination was not based on redundancy." Although it might have no significant impact, this court, having found that there was no termination of the Respondent's employment at the initiative of the Appellant, it is however, essential to point out that the holding was unfounded, as a review of his pleadings reveals that he sought service pay under section 35 and not severance pay under section 40 of the *Employment Act*.

34. In the upshot, the Appellant's appeal succeeds only to the extent brought out herein above- the termination of the Respondent's employment was not at the initiative of the Appellant. Consequently, the award of compensatory damages, under section 49[1][c] of the *Employment Act*, and notice pay are set aside.

35. Each party shall bear its costs of the appeal.

READ, DELIVERED AND SIGNED THIS 12th DAY OF JUNE 2025.

OCHARO, KEBIRA.

JUDGE