



REPUBLIC OF KENYA



KENYA LAW
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**Riley Falcon Security Services v Makinya (Appeal E016 of 2024)
[2025] KEELRC 1690 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1690 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E016 OF 2024
NZIOKI WA MAKAU, J
JUNE 9, 2025**

BETWEEN

RILEY FALCON SECURITY SERVICES APPELLANT

AND

LUKE MAERI MAKINYA RESPONDENT

*(Being an appeal from the judgment and decree of Hon. K. Cheruiyot (SPM)
in KISUMU CMEELRC No. 85 of 2019 delivered on 22nd September 2023)*

JUDGMENT

1. The Respondent Mr. Luke Maeri Makinya filed this suit against Riley Falcon Security Services (the Appellant) before the Chief Magistrate's Court at Kisumu, alleging unlawful termination of employment and non-payment of terminal dues. Upon hearing the matter, the Honourable Magistrate delivered judgment on 22nd September 2023, finding that the Respondent's termination was unlawful. Consequently, the court awarded him the following reliefs:
 - a. Kshs. 164,064/- as 12 months' salary compensation for unlawful termination,
 - b. Kshs. 217,710/- as service pay,
 - c. Kshs. 1,741,582.08 for unpaid overtime,
 - d. Kshs. 580,560.48 for off days worked,
 - e. Kshs. 13,672.66 as one month's salary in lieu of notice, and
 - f. Kshs. 314,456/- for accrued leave covering a 23-year period.
2. Dissatisfied with the judgment, the Appellant filed a memorandum and record of appeal on 19th February 2025. In its appeal, the Appellant raised several grounds. It asserted that the Magistrate erred



in treating the matter as undefended, despite the Appellant’s witness having testified, as reflected in the proceedings of 25th July 2022. Furthermore, the Appellant contended that the Magistrate failed to consider evidence showing adherence to both procedural and substantive fairness, thereby reaching an erroneous finding that the dismissal was unlawful. The Appellant also took issue with the award of service pay, pointing out that the Respondent was a registered member of the National Social Security Fund (NSSF)—a fact he admitted during cross-examination—which, under section 35 of the *Employment Act*, rendered him ineligible for service pay. It further asserted that the award for payment in lieu of notice was unjustified in light of the circumstances of the case and the provisions of section 44 of the *Employment Act*, which allow for summary dismissal where an employee has fundamentally breached their contractual obligations.

3. Additional grounds of appeal included challenges to the awards for overtime and off days worked, which the Appellant claimed were unsupported by evidence. It also contested the award for 23 years’ accrued leave, noting that the Respondent had admitted under cross-examination to having missed leave for only six years—an assertion for which he offered no proof. The Appellant further contended that the trial court failed to appreciate that it had met its evidentiary burden under sections 107, 108, and 109 of the *Evidence Act* by producing concrete evidence to counter the Respondent’s claims. Lastly, it argued that the Magistrate overlooked key aspects of its submissions, thereby failing to consider material facts necessary for a fair and just determination. The Appellant thus urged this Court to set aside the trial court’s judgment and substitute it with an order dismissing the Respondent’s suit with costs.
4. In compliance with directions, both parties proceeded to file written submissions in support of their respective positions.

Appellant’s Submissions

5. In support of its case, the Appellant identified the following issues for determination:
 - i. Whether the Respondent’s employment was unfairly terminated by the Appellant.
 - ii. Whether the Respondent is entitled to compensation for summary dismissal.
 - iii. Whether the Respondent is entitled to leave pay
 - iv. Whether the Respondent is entitled to salary in lieu of notice
 - v. Who should bear costs of the suit.
6. On the first issue, the Appellant submitted that the Respondent’s dismissal was both substantively and procedurally fair, as envisaged under section 41 and 45 of the *Employment Act*. It asserted that the Respondent was afforded an opportunity to be heard before the decision to dismiss him was reached, in line with the principles outlined in the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd* [2013] eKLR, where the court stated:

“The employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly, if it is a case of termination, there is an obligation



on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

7. The Appellant submitted that there was fairness in the process of termination and highlighted the following sequence of events: (a) the Respondent was found inebriated at work on 10th January 2018; (b) misconduct charges were read to him, which he acknowledged by appending his signature; (c) a notice to show cause was issued the same day, to which he responded; (d) his response was considered, and he was suspended from 10th to 17th January 2018; (e) a disciplinary hearing was conducted on 17th January 2018, during which he admitted to having consumed alcohol the previous day; (f) thereafter, he was summarily dismissed and did not appeal the decision. To further buttress its position, the Appellant disputed the Magistrate’s assertion that it did not call any witnesses or adduce evidence. It referred to the proceedings of 25th July 2022, during which its witness testified and produced documents in support of its case.
8. On the second issue, the Appellant maintained that the Respondent was not entitled to compensation for unfair dismissal, given the fairness of the process undertaken. Regarding leave pay, the Appellant submitted that the Respondent failed to provide any evidence that he had not taken leave. It emphasized the testimony of its witness, who stated that the Respondent consistently proceeded on leave. In relation to salary in lieu of notice, the Appellant reiterated that the Respondent’s dismissal was fair and justified, and therefore such a claim was unwarranted. Concerning claims for overtime and off days, the Appellant submitted that these claims were time-barred. It asserted that such claims constituted continuous injuries, giving rise to a fresh cause of action at the end of each month. Accordingly, the Appellant maintained that claims between the years 1995-2017 were statute barred. In support of this argument, the Appellant relied on section 90 of the *Employment Act* and the Court of Appeal’s decision in *G4S Security Services v Joseph Kamau & 468 others* [2018] eKLR, where it was held that employment claims filed after three years are time-barred. With regard to service pay, the Appellant submitted that the Respondent was a registered member of the NSSF and therefore not entitled to service pay under section 35(6) of the *Employment Act*. It relied on the Respondent’s admission during cross-examination that he held an NSSF number and cited the case of *Hassanath Wanjiku v Vanela House of Coffees* [2018] eKLR, where the Court held that employees contributing to NSSF are not entitled to service pay.
9. On the award by the Learned Magistrate of a sum of Kshs. 27,600/- in respect of RFSSL SACCO shares, the Appellant submitted that the claim ought to have been directed to the SACCO. It further emphasized that the Respondent had not produced any evidence showing that he held such an amount with the SACCO. In conclusion, the Appellant urged the Court to set aside the Magistrate’s judgment and substitute it with an order dismissing the claim with costs.

Respondent’s Submissions

10. The Respondent urged the Court to dismiss the appeal with costs and reiterated the submissions he had made before the Magistrate’s Court. He maintained that the Magistrate’s decision was sound, having been rightfully based on the evidence and materials presented. He submitted that the termination of his employment was unfair, as he was not afforded a fair hearing and the reasons for his dismissal were not valid. In support of his position, he relied on sections 43, 45, 46, 49, and 50 of the *Employment Act*. Additionally, the Respondent submitted that following his dismissal, the Appellant failed to pay him all the benefits and monies owed, contrary to section 18(4) of the *Employment Act*. He further asserted that the Appellant failed to submit a report to the Labour Officer as required under section 18(5)(b) of the same Act. With regard to the reliefs sought, the Respondent urged the Court to grant the remedies as prayed in the memorandum of claim, having demonstrated that his termination



was unfair. Specifically, he submitted that he was entitled to general damages equivalent to 12 months' salary, in accordance with sections 49 and 50 of the Employment Act. On the issue of leave, he asserted that it was a statutory entitlement under both his employment contract and the Employment Act. As for house allowance, gratuity, and salary in lieu of notice, he maintained that these were rightfully due upon dismissal and had not been controverted.

Disposition

11. This being a first appeal to the Court, it is in essence an appeal on both facts and the law. As the first appellate court, I am duty bound to revisit and exhaustively re-evaluate and reexamine the evidence presented before the trial court to arrive at my own independent conclusions all the while bearing in mind that unlike the Learned Magistrate, I did not have the advantage of seeing and hearing the witnesses testify and give due allowance for that disadvantage. The Court therefore has extensively reviewed the trial bundle as contained in the record of appeal.
12. The Learned Magistrate awarded Kshs. 314,456/- for accrued leave covering a 23-year period, Kshs. 217,710/- as service pay, Kshs. 1,741,582.08 for unpaid overtime and Kshs. 580,560.48 for off days worked. In order to cast the award of leave dues in the light of the law, one has to consider section 90 of the Employment Act. The Respondent was entitled to annual leave but any such claims for leave would have to be presented to Court within 3 years of the deprivation of leave as any claim beyond 3 years would be statute barred. The same applies to overtime and off days. As such, the awards made covering extensive periods of time beyond what is permissible in law is erroneous and one which this Court must reverse. The claim for service pay is incapable of being awarded as section 35 of the Employment Act bars the Respondent who is a member of NSSF from such an award. The award of Kshs. 217,710/- as service pay is reversed in its entirety.
13. In regard to procedural fairness, an employer is required to hear an employee and accord him the benefits of section 41 of the Employment Act. From the record before the Court, it is clear there was procedural fairness in the process of termination. When the Respondent was found inebriated at work on 10th January 2018, he had charges of misconduct charges levelled against him. There is evidence that the Respondent acknowledged the charges by appending his signature to the charge. He was subsequently issued with a notice to show cause to which he responded. The Appellant asserts the response was considered and the Respondent was suspended from work between 10th and 17th January 2018. A disciplinary hearing was conducted on his return on 17th January 2018 and at the hearing the Respondent admitted to having consumed alcohol the previous day. The Appellant therefore summarily dismissed the Respondent who curiously did not appeal the decision. Contrary to the Learned Magistrate's finding that the Respondent did not call any witnesses or adduce evidence, there is evidence in the proceedings of 25th July 2022 which show that the Appellant's witness testified and produced documents in support of the defence. When a dismissal takes place, sections 43, 45 and 47 of the Employment Act come into play. A dismissal is unfair and unlawful where there is no ground for the dismissal and where the employer does not accord the employee a fair hearing. In this case, the Respondent was given a fair hearing and the employer had reason for termination which was the inebriation at work which constituted misconduct. It is the finding of the Court that given the narration in the preceding paragraph the employer had not only a good reason for termination but also followed the dictates of the law in terminating the employee.
14. When awarding compensation for unlawful termination, the Court has to consider the provisions of sections 49 and 50 of the Employment Act. Key is the conduct of the employee and the employer. In this case only the employee was at fault and therefore there was no basis for an award of compensation as the termination was proper and fair.



15. The Respondent acknowledged receipt of final dues per the discharge he signed on 24th April 2018. He therefore was not allowed to file the suit as he expressly waived the right to do so. In the final analysis the Court sets aside the judgment of the Learned Magistrate in its entirety and substitutes it with an order dismissing the suit before the Magistrate with costs to the employer Riley Falcon Security Services. There however will be no costs on this appeal.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF JUNE 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

