



**Brinks Security Service v Evans (Appeal E010 of 2023)
[2025] KEELRC 2055 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2055 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL E010 OF 2023
AN MWAURE, J
JULY 11, 2025**

BETWEEN

BRINKS SECURITY SERVICE APPELLANT

AND

NGETICH KIPKOECH EVANS RESPONDENT

*(Being an Appeal from the Judgment and order of the Honourable Y.I Khatambi,
Principal Magistrate delivered 11th April, 2023 in Nakuru CM ELRC No. E059 OF 2020)*

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment and order of the Honourable Principal Y.I Khatambi, filed this appeal vide a Memorandum of Appeal dated 5th May 2023 on the grounds that: -
 1. The learned Magistrate erred both in law and by holding that the Respondent terminated the Claimant unlawfully when there was no evidence to support her findings.
 2. The learned Magistrate erred both in law and fact by finding that the Claimant had proved his claim as pleaded when there was no evidence to support her findings.
 3. The learned Magistrate erred in law and fact in finding by failing to consider the evidence of the Appellant at the trial.
 4. The learned Magistrate erred both in law and fact by failing to consider the Appellants' counterclaim at the trial.
 5. The learned Magistrate erred in law and fact by failing to consider the Appellants submissions and entirely relying on of the Respondent's submissions, thereby making a wrong judgment.
 6. The learned Magistrate erred both in law and fact in failing to address her mind to the submissions and authorities cited by the Appellant.



7. The learned Magistrate erred both in law and fact in holding that the Claimant had proved his case on a balance of probabilities when there was no evidence to support his findings.
 8. The learned Magistrate erred both in law and fact in holding that the Claimant had proved his claim for unpaid off days when there was no evidence to support such a finding.
 9. The learned Magistrate erred both in law and fact in holding that the Claimant is entitled to overtime while he did not provide any evidence contrary to that which the Respondent provided to prove his claim.
2. The Appellant prays that:
 - i. The appeal be allowed with costs, and the Claimant's suit in the lower court be dismissed with costs as against the Appellant herein.
 - ii. The costs of this appeal be awarded to the Appellant
 3. Both parties canvassed the appeal by way of written submissions.

Appellant's submissions

4. The Appellant submitted that the Respondent worked for the Appellant for about 2 years and 9 months, and the Respondent contributed to the termination therein; thus, one month's notice pay and one month's salary compensation should be sufficient as damages.
5. The Appellant argued that the trial court erred in awarding the Respondent claims for underpayment from 2018 to 2019, off days, public holidays, and overtime from 2016 to 2019 without supporting evidence such as pay slips or attendance records. The Appellant argued that the Respondent neither produced such evidence nor sought its production from the Appellant. The Appellant relied on the case of *The German School Society & another V Ohany & Another* [2023] KECA 894 (KLR), where a similar award was overturned for lack of proof, the Appellant submits that the lower court's award was unmerited and should be set aside.
6. The Appellant submitted that the lower court erred in awarding the Respondent claims for underpayment, off days, public holidays, and overtime, as these were not supported by documentary evidence such as payslips or attendance records. The Appellant cited various case laws, including: *Maranga V BOG Cheptoroj Secondary School* (2023) eKLR, *Mungai V Gitau t/a Naramat Academy* (2024) eKLR, *Njuguna & 4 Others V Marsh View Ltd* (2023) eKLR, and *Manyisa V Lavington Security Ltd* (2023) eKLR, the Appellant emphasizes that specific monetary claims must be proven with records.
7. Additionally, the Appellant submitted that the claims are time-barred under section 90 of the [*Employment Act*](#), which requires claims of a continuing nature to be filed within 12 months of cessation. The Appellant relied on the cases of *The German School Society V Ohany*(supra), *Stephen Kithuka Kamene V Lauren International Flowers* (2017) eKLR, *Exotic Penina Fields V Simiyu* (2023) eKLR, and *Hkana Jumba Kenyolwa V NEL Enterprises* (2019) eKLR, where similar claims were dismissed for being filed out of time.
8. Therefore, the Appellant urges the court to set aside the trial court's judgment and dismiss the claims.

Respondent's submissions

9. The Respondent submitted that the Appellant agreed that the Respondent was employed as a Night Security Guard in Molo, Nakuru County, under a written contract from 1st December 2016 to



- 15th August 2019, earning a monthly wage of Kshs.9,800/=. As both parties acknowledged the employment relationship and terms, the court is urged to affirm that the Respondent served in that capacity during the stated period.
10. The Respondent submitted that he was unfairly terminated on 15th August 2019 after being accused of absenteeism, despite offering an explanation which was ignored. He was later told to clear out without being issued a Notice to Show Cause or offered a disciplinary hearing. The Appellant contended that the Respondent deserted duty, citing his presence at an unauthorized location, but failed to prove any procedural fairness. The trial court held that the employer violated sections 41, 43, and 45(2) of the Employment Act, by failing to establish valid reasons and to follow a fair procedure prior to termination. Section 47(5) of the Employment Act places the burden of proving unfair dismissal on the employee and justifying it on the employer. The trial court found no evidence of due process or efforts to trace the Respondent as required in various case laws among them Stanley Omwoyo Onchweri V BoM Nakuru YMCA Secondary School (2005) eKLR and Evans Ochieng Oluoch V Njimia Pharmaceuticals Ltd (2016) eKLR. The Respondent also relied on the case of Galgalo Jarso Jillo V Agricultural Finance Corporation [2021] eKLR, where the court emphasized that even with valid reasons, an employer must still adhere to procedural fairness grounded in natural justice. The court thus found the termination both substantively and procedurally unfair, and the judgment of the trial court should stand.
 11. The Respondent submitted that, having proven unlawful and unfair termination, the maximum compensation of 12 months' salary under section 49(c) of the Employment Act was deserved. However, the trial court, guided by section 49(4) and section 50 of the Employment Act, awarded a moderate three months' salary amounting to Kshs.29,795.26/=. considering his 2.5 years of service and lack of contribution to the dismissal. The Respondent relied on the case of Paul Wafula V Century Feeds Ltd (2022) eKLR, the court found the award fair and proportionate, and thus the appeal challenging it lacks merit.
 12. For the reliefs sought, the Respondent submitted that he is entitled to them including one month's notice, underpayment, house allowance, overtime stating that the Appellant failed to provide employment records as required by section 74(1) of the Employment Act, such as attendance logs, which would have shown work hours, departure times, and any absences.
 13. In its counterclaim dated 24th August 2021, the Respondent submitted that the Appellant sought one month's salary in lieu of notice from the Respondent, alleging he failed to provide notice upon termination. The Respondent refuted this in a reply dated 17th September 2021, claiming he was unfairly and unlawfully dismissed. The trial court, in its judgment on 11th April 2023, found the termination was indeed unfair and unlawful, thereby invalidating the Appellant's counterclaim and dismissing it with costs, having relied on the strength of the Respondent's evidence.
 14. The Respondent submitted that the court exercised its discretion to award costs in his favour, and he succeeded in his claim.
 15. The Respondent respectfully urged that this Honourable Court should uphold the decision of the trial court and decline the Appellant's request to set aside or alter the costs awarded for both the claim and the counterclaim.

Analysis and determination

16. The court has considered the record of appeal and rival submissions by both counsels. The issue to determine is whether the appeal is merited.
17. Being the first appellate court, the court must independently review and re-examine the evidence before making its own determination. However, it should keep in mind that it did not observe the witnesses



during the original trial and must account for that limitation in its assessment. In *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court of Appeal stated:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

18. There is no contention that the Appellant had employed the Respondent as a night guard on 1st December 2016. It is alleged that the Respondent was seen at Molo Post bank carrying 20 litres of milk. The Appellant filed a memorandum of response and counterclaim to that effect. The trial court held that the Respondent was unfairly terminated.

19. Perusing the record of appeal, the court is of the view that the Appellant did not follow the procedure set out in sections 41 and 43 of the *Employment Act*. In *Walter Ogal Anuro V Teachers Service Commission* [2013] KEELRC 386 (KLR), the court stated as follows:

“..... for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”

20. In *Echwa V Kenya Airports Authority* [2024] KECA 828 (KLR), the Court of Appeal cited the case of *Ndugu Transport Company Limited V Sewe* [2024] KECA 127 (KLR), where the court held that the question of whether or not a termination is unfair is dependent on whether or not an employer has adhered to the twin requirements of due procedure and substantive justification. The evidence on second point the Claimant was not given valid reasons for termination and neither was the proper procedure stipulated in Section 41 of the *Employment Act* adhered to. Section 41 of the *Employment Act* provides as hereunder-

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

There is no evidence that the Claimant was given an opportunity to be heard in the presence of his witness. The court agrees with the trial court that the Claimant has proved he was unlawfully terminated. Therefore, the appeal is upheld.

21. As for the reliefs awarded the court holds that all the awards were well analysed by the trial court and this court will hesitate to interfere with the same including the compensation for unlawful termination of 3 months equivalent of his salary.

However, some of the awards were time barred having been filed 3 years after the event of the prayers. Indeed the claim was filed on 4th September 2020. Any claim whose cause of action arose before 3rd September 2017 would be barred by time limitation. This is informed by several case laws including



the case of Mary Kitsao Ngoma & 36 Others -vs- Krystalline Limited Appeal 23 of 2013 where court held that claims which arose over 3 years after filing the claim could not be regarded as continuous injury and were time barred.

Therefore, overtime claim for December 2016 to September 2017 would be locked out by time limitation. The court will not award overtime for Kshs.34,530/25 and will reduce the award of Kshs.97,789/54 with Kshs.52,000/= up to September 2017. Award for Kshs.78,229/27 is confirmed. Total for overtime will be Kshs.130,229/27 instead of Kshs.210,549.06/=.

22. Equally for off days the court will disallow Kshs.19,731 to which is time barred and so award Kshs.153,840 – 19,731 = Kshs.134,109/=
23. Public holidays will remove Kshs.5,919.47 and so total award will be Kshs.41,774 – 5,919.47 = Kshs.35,854/53 and the grand total award will be Kshs.342,027/81.
24. The Respondent will be paid costs of the lower court trial and of this appeal trial.
25. Interest will also accrue at 14% per annum on this award from date of judgment until full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 11TH DAY OF JULY, 2025.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

