



**Obatta v Radar Limited (Appeal E001 of 2023)  
[2024] KEELRC 64 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 64 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
APPEAL E001 OF 2023  
AK NZEI, J  
JANUARY 25, 2024**

**BETWEEN**

**EMMANUEL OMONDI OBATTA ..... APPELLANT**

**AND**

**RADAR LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of the principal Magistrate’s Court at Kaloleni Hon. R.W Amwayi – SRM delivered on 14th December 2022 in Kaloleni CMELC E002 of 2021)*

**JUDGMENT**

1. This is an appeal against Kaloleni Principal Magistrate’s Court Judgment (by Hon. R.M. Amwayi) delivered on 14<sup>th</sup> December 2022 in the said Court’s Employment Case No. E002 of 2021, in which the Appellant herein was the Claimant. The Appellant had sued the Respondent herein in the said Court vide a memorandum of claim dated 3<sup>rd</sup> February 2021 and sought the relevant reliefs:-
  - a. a declaration that termination of the Claimant’s employment was unfair, unjust and wrongful.
  - b. terminal and contractual dues amounting to ksh. 603,040.65, tabulated as follows:-
    - i. One month notice .....ksh. 17,966
    - ii. Unpaid earned leave days:
      - a. 2011-2012 (ksh. 445.40 x 25 days)  
x2 years .....ksh. 18,706.80
      - b. 2013 (ksh. 523.60x21 days).....ksh. 10,995.60
      - c. 2013(ksh. 5.23.60x21 days).....ksh. 10,995.60



- d. 2014 (ksh. 523.60x21 days).....ksh. 10,995.60
  - e. 2015 (ksh. 586.40x21 days).....ksh. 12,314.40
  - f. 2016 (ksh. 586.40X21 days).....ksh. 12,314.40
  - g. 2017(ksh. 691.95x 21 days).....ksh. 14,530.95
  - h. 2018 (ksh. 726.55x 21 days).....ksh. 15,257.55
- c. unpaid holidays: -
- i. 2011 (ksh. 445.40x17 days)x2.....ksh. 15,143.60
  - ii. 2012 to 2013(ksh. 523.60x 11 days)  
x2 years.....ksh. 23,038.40
  - iii. 2014 (ksh. 523.60x11)x 2 .....ksh. 11,519.20
  - iv. 2015 (ksh. 586.40 x 11 days)x2.....ksh. 12,900,50
  - v. 2016 (ksh. 586.40x12 days)x2.....ksh.
  - vi. 2017 (ksh. 691.95X 16 days0 x2 .....ksh. 22,142.40
  - vii. 2018 (ksh. 726.55x9 days x2).....ksh. 13,077.90
- d. House allowance (ksh. 1,026x12 months  
x7 years).....ksh. 86,184.00
- e. Severance pay (ksh. 726.55x15 days  
x7 years).....ksh. 76,287.75
- f. Compensation for unfair termination  
ksh. 17,966x12 months).....ksh. 215,592.
2. The Appellant had pleaded:-
- a. that he was employed by the Respondent as a security guard on 16/11/2011, earning a basic salary of ksh. 17,966 at the time of termination.
  - b. that on 16/11/2018, the Appellant was terminated from employment without any justifiable reasons and without following laid down procedures.
  - c. that the Respondent failed to follow the required procedure for termination as contemplated under Sections 41,43 and 45 of the Employment Act 2007.
  - d. that the Respondent failed to pay the Claimant all his terminal dues prior to termination contrary to Section 18,35 and 49 of the Employment Act.
  - e. that the Respondent had no genuine reason to unfairly terminate the Claimant, and that there was nothing to suggest or to demonstrate any gross misconduct on the part of the Claimant.
3. Documents filed by the Appellant in the trial Court alongside his said memorandum of claim included his written witness statement dated 3/2/2021 and an evenly dated list of documents listing some eight documents. The listed documents included copies of the Claimant's identity card, NSSF statement,



- Claimant's certificate of service, letter of termination, KRA Pin certificate, a demand letter dated 23/11/2023, Regulation of Wages (protective Security) Order 1998 and an email dated 25/11/2020 forwarding the demand letter.
4. The Respondent entered appearance and filed a memorandum of Response on 29/3/2021. The Respondent admitted having employed the Appellant as a security guard, but pleaded that his contract had lapsed. The Respondent further pleaded that the Appellant's salary was guided by Regulation of Wages (General) (Amendment) Orders for the respective years that the Appellant worked, and that his salary was inclusive of house allowance in line with the Regulations of Wages (General) (Amendment) Orders for the years 2015,2017 and 2019.
  5. The Respondent had further pleaded:-
    - a. that the Claimant was issued with a one month notice of termination of employment in accordance with Section 35 of the Employment Act.
    - b. that the Claimant never worked on any public holiday and that as at the time the contract lapsed, the Claimant had exhausted all his leave days, and notice period was duly served.
    - c. that termination of the Claimant was done lawfully in accordance with provisions of the Employment Act No. 11 of 2007.
    - d. that the claim for severance pay cannot issue as the Claimant was not declared redundant.
    - e. that the Claimant's claim should be capped at 3 years in line with Section 90 of Cap 226 Laws of Kenya.
  6. Other documents filed by the Respondent in the trial Court included a written witness statement of one Philip Sane dated 24/2/2021 and an evenly dated list of documents listing 5 documents. The listed documents were the Regulation of Wages (General) (Amendment) Order for the years 2012, 2013,2015,2017, and 2018 respectively.
  7. The Appellant is shown to have testified and to have been cross-examined at the trial Court. He adopted his filed witness statement as his testimony and produced in evidence the documents referred to in the paragraph 3 of this judgment. The Appellant further testified that he had not been given any contract by the Respondent upon employment, and was not told the reason for his dismissal.
  8. Cross-examined, the Appellant testified:-
    - a. that he was employed by the Respondent in November 2011 and worked upto 2018, for 7 years. That on 15/11/2018, he was forcefully served with a termination letter which already had a date on it, indicating that his termination would take effect on 1/11/2018.
    - b. that the Appellant was not given leave and was not paid.
    - c. that the Appellant never went on (observed) public holidays, though he had not expressly mentioned the days he had not observed (taken).
    - d. that the Appellant was, for 7 years, not paid house allowance, and was not issued with a payslip every month. That the payslip indicated gross pay, and that his NSSF was deducted monthly.
  9. The Respondent called one witness, Rinah Ondego (RW-1), who adopted her witness statement as her testimony. The witness further testified:-



- a. that the Appellant was given a 30 days termination notice, and signed the notice; and that on the issue of unpaid leave, the Appellant never applied for leave, and never complained that he had been denied the right to proceed on leave.
  - b. that an employee who did not go on public holidays was paid or compensated with two off days, and that the Appellant had not indicated which public holidays he failed to take, and during which year. That the Appellant had not demonstrated that he worked on any specified public holidays.
  - c. that the Appellant was paid as per the Wage Orders, and that his salary was consolidated to include house allowance.
  - d. that the Appellant could not be paid severance pay as he was not declared redundant, but was terminated upon being issued with one-month notice, and that the termination was not unfair.
10. Cross-examined, RW-1 testified that the Appellant's termination letter referred to a contract between the Respondent and the Appellant, which contract the Respondent had not produced in Court. that the date on the termination letter, 1/10/2018, was hand-written by the Appellant himself when the letter was given to him. That RW-1 did not witness the Appellant signing the letter. That the letter did not indicate the reason for termination.
11. RW-1 further testified, under cross-examination, that the Appellant's termination was as a result of the Respondent's re-Organisation whereby the Appellant did not meet the cut. That the Appellant did not have terminal dues as NSSF contributions were made.
12. The trial Court delivered its judgment on 14/12/2022 after receiving written submissions, and dismissed the Appellant's claim with costs on ground that the Appellant had not proved his case against the Respondents to the required standards.
13. Aggrieved by the said judgment, the Appellant preferred the present appeal and set forth the following grounds of appeal:
- a. the learned magistrate erred in law and fact by disregarding the Appellant's evidence and legal provisions, and subsequently finding that the Appellant was lawfully terminated despite the evidence on record indicating that the respodnent defaulted in both substance and procedure.
  - b. the learned magistrate erred in law and fact in finding that the reliefs sought by the Appellant were time barred despite the statutory limitation being three years, within which the Appellant had already filed suit.
14. The Appellant sought the following orders on appeal:-
- a. that the appeal be allowed and the judgment delivered on 14<sup>th</sup> December by the trial Court be set aside in its entirety.
  - b. that the Court awards the Appellant the prayers sought in the claim.
  - c. that costs of the appeal be awarded to the Appellant.
15. This is a first appeal, and this Court is mandated to re-evaluate the evidence before the trial Court as well as the trial Court's judgment, and to arrive at its own independent judgment on whether or not to allow the appeal. A first Appellate Court is mandated to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses testify. This duty of a first appellate Court was stated



in *Selle & Another -vs- Associated Motor Boat Co. Ltd & Another* [1968] E.A. 123, and was re-stated in *Mursal & Another -vs- Manese* [2022] eKLR.

16. Having considered the pleadings filed in the trial Court and evidence presented thereat, and which I have summarized herein, issues that fall for determination by this Court, in my view, are as follows:-
  - a. whether termination of the Appellant's employment was unfair.
  - b. whether the Appellant is entitled to the reliefs sought by him in the trial Court.
17. On the first issue, it was not disputed that the Appellant was employed by the Respondent as security guard in November 2011, and that he worked until 31/10/2018 when his employment was terminated by the Respondent vide a termination of employment letter shown to have been served on the Appellant on 1/10/2018. The Appellant produced a copy of the termination letter in evidence at the trial.
18. The said termination letter reads, in part:-

“RE: TERMINATION OF EMPLOYMENT

We refer to the above and regret to inform you that your employment with the company has been terminated with effect from 1<sup>st</sup> November 2018. This letter serves as a notice as stipulated in your contract.

.....the company shall undertake to pay your final dues in full and in the meantime, kindly arrange to return all company properties and equipment in your possession.”
19. It is worth noting that the contract referred to in the termination letter was not produced in evidence by the Respondent, and that the termination letter did not state the reason or the basis of termination of the Appellant's employment. This notwithstanding, the Respondent's witness (RW-1), who told the trial Court that she was the Respondent's Human Resource Manager, testified that termination of the Appellant's employment resulted from reorganization of the Respondent company whereby the Appellant did not meet the cut. The termination letter, which also served as a termination notice, did not state this as the reason for termination, and the Appellant was never informed or notified of “how he failed to meet the cut”, and hence termination. He was also not given an opportunity to be heard on this allegation.
20. In my view, the Appellant was legally entitled to be informed of the reason for termination of his employment, and ought to have been given an opportunity to be heard on such reason and/or ground, and the truth and/or validity of such reason/ground ought to have been proved by the Respondent, if the termination was to pass both substantive and procedural fairness test. This was not done. Sections 41,43(1) and 45 of the *Employment Act* 2007 are called in aid.
21. I find and hold that termination of the Appellant's employment was procedurally and substantively unfair; and I so declare. The trial Court's finding that the termination was fair is hereby set aside.
22. Turning to the second issue, and having made a finding that termination of the Appellant's employment was unfair, I award the Appellant the equivalent of eleven months' salary as compensation for unfair termination of employment, taking into account the manner and circumstances in which the Appellant's employment was terminated, taking into account the fact that the Appellant was not shown to have in any way contributed to the termination. It was not disputed that the Appellant was earning a monthly salary of ksh. 17,966 at the time of termination. The equivalent of eleven months' salary is therefore ksh. 17,966X11=ksh. 197,672 which I award the Appellant.



23. The claim for one month salary in lieu of notice is declined. I am satisfied that the termination letter, which also served as a termination notice, was duly served on/given to the Appellant at least twenty eight days prior to the termination dated 1/11/2018). This satisfies Section 35(1) (c) of the Employment Act. The letter is clearly shown to have been signed by the Appellant in acknowledgement of receipt thereof, and is dated by him by hand, “1<sup>st</sup> October 2018”. The Appellant did not dispute the signature and handwriting said to be his. He is even shown to have written his identity card number on the said letter.
24. Regarding the claims for unpaid earned leave days and unpaid house allowance, shown to have accrued during the entire period of employment, it is my finding that these were in the nature of a continuing injury as contemplated in Section 90 of the Employment Act. The continuing injury ceased upon termination of the Appellant’s employment.
25. Section 90 of the Employment Act provides as follows:-

“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”
26. The cessation date of the continuing injury against the Appellant in the present case was the date of the Appellant’s termination. The termination was shown to have taken effect on 1/11/2018. The claim thereon ought to have been filed in Court within twelve months from the said date of termination. The Appellant filed his claim in the trial Court on 4/2/2021, over two years from the cessation date. The claims are statute-barred and cannot be allowed.
27. The claim for severance pay cannot be allowed as the Appellant’s termination did not result from redundancy pursuant to Section 40 of the Employment Act.
28. The Appellant’s appeal herein partly succeeds to the extent stated in this judgment. For avoidance of doubt, judgment is hereby entered for the Appellant against the Respondent in the sum of ksh. 197,626 being compensation for unfair termination of employment.
29. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
30. The Appellant is awarded costs of the appeal, to be taxed at the lower scale, and costs of proceedings in the Court below. The Appellant is also awarded interest at Court rates, to be calculated from the date of this judgment

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> JANUARY 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

**AGNES KITIKU NZEI**



**JUDGE**

Appearance:

.....Appellant

.....Respondent

