



**Adika v Security 24 Limited & another (Appeal E048 of 2023)
[2024] KEELRC 14 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 14 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E048 OF 2023
S RADIDO, J
JANUARY 24, 2024**

BETWEEN

GEOFFREY OMONDI ADIKA APPELLANT

AND

SECURITY 24 LIMITED 1ST RESPONDENT

HOMES UNIVERSAL LIMITED 2ND RESPONDENT

*(Being an Appeal from the Judgment of the Senior Principal
Magistrates Court at Winam by the Honourable F.M. Rashid (PM)
in Winam PM ELRC No. E001 of 2023 delivered on 25th July 2023)*

JUDGMENT

1. Geoffrey Omondi Adika (the Appellant) sued Security 24 Ltd and Homes Universal Ltd (the Respondents) before the Senior Principal Magistrate, Winam alleging unfair termination of employment and breach of contract.
2. The Respondents did not enter appearance or defend the Cause and it proceeded to formal proof.
3. The Appellant testified and in a judgment delivered on 25 July 2023, the Senior Principal Magistrate dismissed the Cause on the ground that the Appellant had not established the existence of an employment relationship with the Respondents.
4. The Appellant was dissatisfied and he lodged a Memorandum of Appeal with the Court on 18 August 2023, contending that:
 - i. The Learned Trial Magistrate erred in law and fact in finding that there was no employer/employee relationship.



- ii. The Learned Trial Magistrate erred in law and fact in failing to take into consideration the documents produced by the Claimant.
 - iii. The Learned Trial Magistrate erred in law and fact in dismissing the suit.
 - iv. The Learned Trial Magistrate erred in law and fact in failing to appreciate the provisions of section 10 of the *Employment Act*.
 - v. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
5. The Court gave directions on 19 October 2023. The Appellant filed his submissions on 18 December 2023.
 6. The Court has considered the pleadings, evidence and submissions.

Role of the Court on first appeal

7. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that:

this being the first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

8. The Court will keep the interdict in mind.
9. The Court notes that the Respondents did not participate in the proceedings before the trial Court and that they were served with the Record of Appeal herein.

Employment relationship

10. In finding that the Appellant had failed to establish an employment relationship with the Respondents, the Senior Principal Magistrate noted:

In this case, the Claimant produced a demand letter, wages regulation for 2018 and 2022 and a copy of the occurrence book extract as exhibits herein. The Claimant did not produce an employment letter, termination letter or pays slips as proof of an employer employee relationship..... From the evidence on record, there is no proof that there was an employment relationship between the Claimant and the Respondent and that he was paid a monthly salary of Kshs 9,400/- as alleged or any other averments of fact in the Memorandum of Claim.

11. Under section 9 of the *Employment Act*, 2007, it is the duty of the employer to reduce an employment contract into writing where the contract is to perform work which in the aggregate exceeds 3 months.
12. The contract document, therefore, is the primary evidence of the existence of an employment relationship.
13. Where the primary evidence is lacking, the Court can look at and rely on secondary records such as those kept by the National Social Security Fund or National Hospital Insurance Fund.
14. In cases where the employer fails to reduce a contract into writing and a legal dispute ensues, section 10(7) of the *Employment Act*, 2007 places a burden on the employer to disprove the alleged terms of the contract.



15. The Appellant herein pleaded that he was employed by both Respondents in March 2022 as a night guard. The same assertion was repeated in the witness statement which was adopted as evidence.
16. The Appellant also produced a copy of an extract of an occurrence book said to be kept by the Respondents.
17. The Appellant's oral testimony under oath as to the employment relationship was not controverted or rebutted as the Respondents opted not to participate in the proceedings. The credibility of the copy of the extract of the occurrence book was also not controverted.
18. The oral testimony and the extract could lead to an inference of an employment relationship. The Learned Trial Magistrate failed to consider the effect of these evidence.
19. This Court, therefore, finds that the Senior Principal Magistrate fell into an error of fact and law in finding that an employment relationship was not proved.

Unfair termination of employment

20. The Appellant's testimony that his employment was terminated without notice or disciplinary process in December 2022 remained unchallenged and by dint of sections 35(1)(c) and 41 of the [Employment Act, 2007](#), this Court finds that the Appellant's employment was unfairly terminated.
21. The Appellant served the Respondents from 2020 to 2022, a period of about 2 years and in consideration of the length of service, this Court is of the view that the equivalent of 3-months' salary as compensation and 1-month salary in lieu of notice would be appropriate (prescribed minimum wage at time of separation was Kshs 16,959/-).

Underpayments

22. The Appellant's case was that he was earning Kshs 9,400/- per month during the duration of the contract while the prescribed minimum wage for a security guard was Kshs 15,141/- (exclusive of house allowance) and Kshs 16,959/- (from May 2022).
23. Consequently, the Appellant made a claim for underpayments of prescribed minimum salary and house allowance totaling Kshs 289,165/-.
24. On the basis of the record, this Court will allow this head of the claim.

Leave allowance

25. The Appellant prayed for a leave allowance of Kshs 58,508/-, but he did not lay a contractual, evidential or legal foundation to this head of the claim and relief is declined.

Overtime

26. It is a notorious fact and the Court takes judicial notice that security guards in this country work 12 hour shifts while the [Regulation of Wages \(Protective Security Services\) Order, 1998](#) provides for 52 hours spread over 6 days of the week.
27. The Appellant testified that he worked from 6.00 pm to 6.00 am and the testimony remaining unchallenged, it means he worked 4 hours overtime every day.
28. The Court will, therefore, allow the claim for overtime in the sum of Kshs 570,082/-.



Rest days

29. The Appellant did not place an evidential basis for this head of the claim before the trial Court and relief is declined.

Certificate of Service

30. A Certificate of Service is a statutory entitlement and the Respondents should issue one to the Appellant within 30 days of this judgment.

Conclusion and orders

31. Arising from the above, the Court sets aside the judgment by the Principal Magistrate and substitutes it with judgment finding and declaring the termination of the Appellant's employment was unfair.
32. The Appellant is awarded:
- i. Compensation Kshs 50,877/-
 - ii. Pay in lieu of notice Kshs 16,959/-
 - iii. Underpayments Kshs 289,165/-
 - iv. Overtime Kshs 570,082/-
- Total Kshs 927,083/-
33. The Respondents to issue a Certificate of Service to the Appellant within 30 days.
34. The Appellant to have costs of the Appeal and before the Principal Magistrates Court.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF JANUARY 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Appellant Lugano & Lugano Co Advocates

Respondents did not participate

Court Assistant Chrispo Aura

