



REPUBLIC OF KENYA



**Riley Falcon Security Services v Kamuga (Appeal E036 of 2022)
[2024] KEELRC 392 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 392 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E036 OF 2022
CN BAARI, J
FEBRUARY 29, 2024**

BETWEEN

RILEY FALCON SECURITY SERVICES APPELLANT

AND

CALEB OTIENDE KAMUGA RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. K. Cheruiyot
(SPM) delivered on 10th June, 2022 in Kisumu CMELRC NO. 37 OF 2020)*

JUDGMENT

1. Before Court is an appeal against a judgment delivered on 10th June, 2022, where the Trial Court entered judgment in favour of the Respondent, and made an award of salary for November, 2020, salary underpayment, overtime, house allowance, gratuity, costs, interest and an order for issuance of a certificate of service.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 13th October, 2022.
3. The appeal is premised on the grounds THAT:
 - i. The Learned Magistrate erred in law and in fact by failing to appreciate the evidence tendered by both the Appellant and the Respondent, and failing to analyze and apply the correct law thereby arriving at an erroneous conclusion that is not premised on evidence and law.
 - ii. The Learned Magistrate erred in law and in fact by failing to properly and sufficiently appraise, interpret and apply the provisions of Section 90 of the Employment Act 2007, hence he arrived at an inconsiderate finding and decree.
 - iii. The learned Magistrate erred in law and in fact by failing to properly and sufficiently appraise, interpret and apply the provisions of Section 35(6) of Employment Act, 2007 and Regulation



17(2) of the Regulation of wages (Protective Security Services) order, 1998 hence he arrived at an inconsiderate finding by awarding the Respondent gratuity pay.

- iv. The Learned Magistrate erred in law and in fact in failing to take into account the Appellant's submission.
 - v. The order of the Trial Magistrate is contrary to the weight of submissions, law and material on record.
4. The Appellant prays that this appeal be allowed, and the Judgment of the subordinate Court be set aside and be substituted with a Judgment dismissing the Respondent's suit in the subordinate court with costs.
 5. The Appellant further prays that it be awarded the costs of this appeal.
 6. The Respondent lodged a cross-appeal dated 3rd November, 2022, and filed on 7th November, 2022, wherein, he seeks to overturn the trial court's finding that both the reason and the procedure for termination were fair.
 7. Submissions were filed for both parties on the appeal and the cross-appeal.

The Appellant's Submissions both the appeal and the cross-appeal

8. It is the Appellant's submission that it acted in compliance with Section 41 of the [Employment Act](#) having given the Respondent a fair hearing before terminating his employment. The Appellant further submits that all proper notices were given to the Respondent, which he read and signed and was afforded a disciplinary hearing where he had the right to come with a fellow employee which he did not, and did not appeal the decision of the committee, which was an avenue that was open for him. Reliance was placed on the decision in Thonias Sila Nzivo vs Bamburi Cement Ltd (2014) eKLR, where the Court held as follows:

“In terms of procedural fairness, the Claimant can have no justification in alleging that the Respondent fell short of the minimum statutory standards. The procedure was in full conformity to Section 41 of the [Employment Act](#) 2007.”

9. The Appellant further submits that the Learned Trial Magistrate was therefore right to make a finding that the Respondent was lawfully terminated, and the cross appeal must therefore fail.
10. It is the Appellant's submission that the Learned Magistrate erred in awarding the Respondent days worked, which claim was not pleaded in the memorandum of claim, and pray that this award be set aside.
11. It is the Appellant's submission that that the claim for under payment was statute barred. The Appellant further submits that the Respondent's right to sue lapsed after three years when the cause of action arose and as such, he lacked the capacity to bring the cause of action as against the Appellant. It sought to rely in the Court of Appeal decision in G4S Security Services (K) Limited Versus Joseph Kamau & 46 _8 Others [2018] eKLR to support this position.
12. The Appellant submits that the Respondent would only be entitled to lodge any claim for overtime leave pay for a maximum of three years from the date the complaint arose. It is their submission that the claim for overtime pay is equally time barred.
13. The Appellant finally submits that the Respondent having been a member of the NSSF, is by Section 35 (6) of the [Employment Act](#), not entitled to the award of gratuity.



The Respondent's Submissions

14. It is the Respondent's submission that he was unlawfully and unprocedurally terminated because he was denied the opportunity to be heard, which is a sacrosanct right protected under the principles of natural justice. The Respondent had reliance in the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR to support this position.
15. It is submitted that the Respondent is entitled to the remedies sought, considering that he was unfairly terminated. It is further submitted that the Respondent is entitled to damages for unfair termination, and unpaid salary for November 2020.
16. The Respondent submits that contrary to the submission by the Appellant, a claim for underpayment is not a continuing injury and is thus not statute barred per Section 90 of the *Employment Act*, 2007. Reliance was had to the decision of Maureen J in *Charles Ogola & 2 others v Mansion Hart Kenya Limited* [2019] eKLR, for the holding that:-

“On the first issue, overtime is a continuing wrong while underpayments is a right. It is therefore only overtime that would statute barred after 12 months as provided under Section 90 of the *Employment Act*. Underpayments would however accrue like all other terminal benefits so long as the claim is filed within 3 years from the date of accrual of cause of action.”
17. It is the Respondent's submission that he is entitled to house allowance as he was underpaid. He sought to rely in the case of *Ebrahim Ochieng Othuon & 2 Others v Chemelil Sugar Co. Ltd* [2014] eKLR to buttress this position.

Analysis and Determination

18. Upon careful appraisal of both the Appeal, the cross-appeal and the submissions by both parties, the grounds of appeal and cross-appeal are summarized as follows: -
 - i. Whether the subordinate court erred in finding that the Respondent was lawfully terminated.
 - ii. Whether the Respondent deserved the awards made in respect of days worked, unpaid salary for the month of November 2020, salary underpayment, overtime, unpaid house allowance from 2009 to 2013, and the award of gratuity.
19. The Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, had this to say on handling of appeals: -

“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 allowances in this respect.”
20. Further in *Peters v Sunday Post Ltd* [1985] EA 424, the Court held thus: -

“Whilst an Appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the Trial Judge



has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the Appellate Court will not hesitate so to decide”

21. It then follows that my mandate as a first Appellate Court is to reappraise, reanalyze and re-evaluate the evidence adduced before the Trial Court in its entirety and make my own conclusion.
22. The Trial Court found the Respondent’s termination fair on the premise that he was accorded fair process. The Respondent’s submission is that he was invited to the disciplinary hearing, but was not allowed into the meeting room. It is his further evidence that he was instead, instructed to sit outside and later told to go back home, and await the decision of the Appellant’s disciplinary panel.
23. The issue for this Court is whether the Appellant accorded the Respondent fair process before he was terminated.
24. Sections 41, 43, 45 and 47(5) of the *Employment Act*, provide the irreducible minimums for a termination/dismissal to pass the fairness test. The employer must show that the employee was terminated within the procedures set out in Section 41 and that the termination/dismissal meets the substantive justification test. (See *Walter Ogal Anuro v. Teachers Service Commission*) (2013] EKLK)
25. The Respondent maintains that his termination was unfair on the basis that he was not represented at the hearing by a colleague as required by law.
26. Further, the Respondent was terminated for absconding duty. His only response is that he sought to extend his leave through his supervisor to enable him attend to a sick relative. He was instead asked to show cause why he should not be dismissed for absconding duty. I also note that the Respondent was asked to respond to the show cause letter within 48 hours, which he did.
27. The Respondent admitted not reporting back to work when his leave ended. His assertion that he notified his supervisor of his inability to return on the due date was not rebutted.
28. The Respondent’s supervisor is said to be a person in the employ of the Appellant, and who would easily have tendered evidence in support of either the Appellant’s position or the Respondent’s. He/she did not.
29. Further, 48 hours to respond to a show cause letter is not in my view reasonable time, and the fact that the Respondent managed to respond to the show cause within that period, did not justify the timing.
30. The Respondent’s assertion that he was not allowed and/or advised to appear for hearing in the company of a representative was not at all rebutted. This is an express requirement under Section 41 and which was blatantly violated. In *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd* [2013] eKLR, the Court observed as follows:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that 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 summary dismissal, 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.”

31. Further, in *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR the Court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
32. The time given to respond to the show cause, coupled with the failure to allow the Respondent a chance to be represented, rendered the procedure unlawful and the termination unfair.
33. On the question of whether or not the Appellant had valid reason to terminate the Respondent herein, the Respondent admitted absconding duty. His evidence however, is that he informed his supervisor why he could not report back to work, and that the supervisor approved his absence.
34. Absconding duty is a serious breach of a contractual obligation, and which if proven, would justify a termination of service. In *Nyeri Civil Appeal No.97 of 2016: Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another*. The Court of Appeal held:

“In a claim such as this, the burden providing that an unfair termination of employment or wrongful dismissal has occurred rests with the employee, while the burden of justifying the grounds for the termination of employment rests with the employer. See Section 47(5) of the *Employment Act*...”
35. To discharge the burden placed upon it under Section 43, the Appellant was under duty to prove the reasons that it genuinely believed to exist, causing it to terminate the Respondent’s services.
36. In my view, the failure to procure the evidence of the Respondent’s supervisor to show that he did not allow the Respondent to extend his leave or absent himself from duty, goes to say that the Appellant/ employer did not discharge the burden placed upon it under Section 43 of the *Employment Act*.
37. In the circumstances, I find and hold that the Appellant did not establish valid, fair and justified reason to terminate the Respondent.
38. In the premise, the cross-appeal succeeds, and the finding of the Trial Court that the Respondent was lawfully terminated is set aside.

Damages for unfair termination

39. The Respondent’s termination has been found to be unfair. This finding no doubt entitles the Respondent to compensation per Sections 49 and 50 of the Employment.
40. The Respondent was previously taken through disciplinary procedure for an act of misconduct, which resulted in being issued with a warning letter. Considering that the Respondent did not have a clean record of service, I deem an award of two months’ salary sufficient compensation for the unfair termination and which is hereby awarded.

House allowance, Overtime pay and gratuity

41. The pay slips produced in evidence are prove that the Respondent was paid house allowance throughout his employ with the Appellant. The award on this account is unjustified, and is hereby set aside in its entirety.



42. Similarly, the pay slips show that overtime was paid making the award by the trial court unjustified. It is set aside.
43. An employee is not entitled to gratuity as a matter of course. One has to prove that gratuity was either a term of contract or provided for under a collective bargaining agreement.
44. The Respondent did not lead any evidence to show that he was entitled to gratuity. In *John Karanja Mbogo v Leah Wangui t/a Gilgil Distributors Limited* [2020] eKLR the court in dismissing a prayer for gratuity stated that: -
- “The claim for gratuity is not due. The Claimant had no written contract giving him such benefit. The Respondent was paying statutory dues and even where a service pay was claimed, with such payment of PAYE, NSSF not service pay is due.”
45. The upshot then, is that the awards on account of house allowances, overtime payment and gratuity are set aside for the reasons foregone.

Underpayment

46. The Trial Court awarded the Respondent salary underpayment for the period between 2009 and 2018. This suit was lodged in November, 2020. Section 90 sets the limitation period for claims arising from employment contracts at 3 years.
47. By simple arithmetic, only the claims for underpayment in respect of November, 2017 and the whole of 2018 are valid. The rest are statute barred.
48. In whole, both the cross-appeal and the main appeal partly succeeds, and orders granted as follows: -
- i. That the finding of the Trial Court that the Respondent (Appellant in the cross-appeal) was lawfully terminated is set aside, and substituted therewith a finding of an unfair termination.
 - ii. That the Respondent (Appellant in the cross-appeal) is awarded 2 months salary as compensation for the unfair termination at Kshs. 30,282/-
 - iii. The award of unpaid salary for November, 2020 is upheld at Kshs. 15,141/-
 - iv. The award of underpayment is partly upheld at Kshs. 23,294/-
 - v. The award of overtime payment, house allowance and gratuity is set aside in their entirety.
 - vi. Costs and interest awarded by the Trial Court are set aside and parties shall bear their own costs.
 - vii. The Appellant will bear half the costs of the appeal and cross-appeal as consolidated.
 - viii. Interest on the awards made herein, at Court rate until payment in full.
49. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29TH DAY OF FEBRUARY, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Anuro present for the Appellant



Mr. Otieno for the Respondent

Erwin Ongor - Court Assistant.

