



**Riley Falcon Security Services v Omollo (Appeal E037 of 2022)  
[2024] KEELRC 389 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 389 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E037 OF 2022  
CN BAARI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**RILEY FALCON SECURITY SERVICES ..... APPELLANT**

**AND**

**MICHAEL ODHIAMBO OMOLLO ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. K. Cheruiyot  
(SPM) delivered on 10th June, 2022 in Kisumu CMELRC NO. 38 OF 2020)*

**JUDGMENT**

1. Before Court is an appeal against a judgment delivered on 10<sup>th</sup> 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 13<sup>th</sup> October, 2022.
3. The appeal is premised on the grounds that:
  - i. The Learned Magistrate erred in law and in fact in awarding the Respondent unpaid house allowance from 2009 to 2013, and gratuity when the same was not pleaded by the Respondent.
  - ii. The Learned Magistrate erred in law and in fact by failing to appreciate evidence tendered by both the Appellant and the Respondent and failing to analyse and apply the correct law thereby arriving at erroneous conclusion that is not premised on evidence and the law.
  - iii. The Learned Magistrate erred in law and in fact by awarding the Respondent 20 days unpaid salary in November, whereas the Respondent acknowledged that he was paid for the month of November, 2020.



- iv. 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.
  - v. That the Learned Magistrate erred in law and in fact in failing to take into account the Appellant's submissions.
  - vi. 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 3<sup>rd</sup> November, 2022, and filed on 7<sup>th</sup> 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 proceeded to hear and consider representations by the employee/Respondent before making a decision to terminate his services. It sought to rely on the decision in Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd Industrial Court Cause No. 66 of 2012 where the court observed as follows:
 

"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 defense/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."
9. It is the Appellant's submission that the Respondent abandon work without awaiting a response from the Appellant. It had reliance in Thomas Sila Nzivo vs Bamburi Cement ltd (2014) eKLR to support this position.
10. The Appellant further submits that the Respondent did not call any person to corroborate his evidence that he was coerced into writing the apology letter in response to the show cause letter.
11. The Appellant further submits that the Respondent did not provide evidence nor call a witness to prove that his termination was oral. It is the Appellant's further submission that the Respondent left employment halfway through the disciplinary process, charges having been read to him, a show case letter issued and for which he responded to.
12. It is its submission 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.



13. 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.
14. 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.
15. The Appellant submits that the Respondent would only be entitled to lodge any claim for overtime and leave pay for a maximum of three years from the date the complaint arose. It is their submission that while the claims for overtime is statute barred, the same was paid as reflected in the Respondent's bundle of Payslips.
16. It is the Appellant's submission that the Trial Court erred in awarding the Respondent house allowance and gratuity, the two not having been pleaded.

### **The Respondent's Submissions**

17. It is the Respondent's submission that the Appellant's conduct constituted unlawful termination of the Respondent's services within the meaning of Section 45, as read with Section 35 (1) (c) of the *Employment Act*. It is his further submission that the Appellant did not issue any notice to the Respondent, nor were any disciplinary hearings conducted.
18. It is submitted further that the Respondent was supposed to be taken through a disciplinary process in accordance with Section 41 of the *Employment Act*, which was not done, even though a show cause was served upon him, he was arm-twisted into asking for forgiveness, for what he did not do, only to be terminated orally. Reliance was placed in David Njoroge Muiru -vs- Elsa Limited (2014) eKLR to buttress this position.
19. The Respondent urges this Court to find that the Respondent was unlawfully terminated, and award him general damages for unlawful termination together with salary in lieu of notice.
20. The Respondent further submits that the only issue that should be limited to one year is overtime, and which he only claimed for a period of 1 year.
21. The Respondent submits that underpayment is not a continuing wrong and hence his claim in this respect should be allowed. He had reliance in the decision of Lady Justice Maureen Onyango in the case of Charles Ogola & 2 others v Mansion Hart Kenya Limited [2019] eKLR to support his position.
22. The Respondent submits that he was a night guard, and was paid a basic salary of KShs.10,954/= against a general wage of KShs.14,420/=. hence, underpayment for the period worked in 2017 is KShs.6,932/=, having worked for two (2) months, that is, November and December.
23. The Respondent finally prays that the award of cost and interest by the Trial Court be upheld and he further be awarded the cost of this appeal.

### **Analysis and Determination**

24. 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 and if so, whether he is entitled to damages for unfair termination.
  - ii. Whether the Respondent deserved the awards made in respect of salary underpayment, overtime, interest and costs.
25. 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.”
26. 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”
27. 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.
28. A fair termination means that the employer adhered to the twin requirements of fair process and the substantive justification for the termination.
29. On the question of procedure, the record indicates that the Respondent was issued with a show cause letter on the charges leveled against him, and which show cause he responded to vide a hand written apology.
30. 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] EKLR).
31. The Appellant’s position is that the Respondent wrote the apology and left work before the completion of the disciplinary process. Having issued a show cause letter and received a response from the Respondent, nothing shows that the Appellant ever invited the Respondent for a hearing. In *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017) eKLR the Court expounded on the provisions of Section 41 stated,
- “To satisfy the requirements of Section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time (emphasis own).”
32. Further in the case of *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR the Court held that the *Employment Act* has made it mandatory by virtue of Section 41 for an employer to notify and hear any



representations an employee may wish to make whenever termination is contemplated and is entitled to have a representative present.

33. The Respondent was not invited for a hearing, and no notice of such hearing was issued. Further, the 48 hours allowed to the Respondent to respond to the show cause letter, is in my view unreasonable, and which render the termination unfair on account of procedure, and so I hold.
34. On the question of whether the Appellant had valid reason to terminate, the Respondent, both in his testimony and response to the show cause letter, admitted to the charge against him through his apology letter, which also doubled up as his response to the show cause.
35. The Court of Appeal in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR held:

“..... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.”
36. The Appellant’s code of conduct expressly demanded that the Respondent remains alert while at work. His admission that he slept at work while the guarded premises were solely under his care, in my view constitute justified reason for termination.
37. In the circumstances, I find and hold that the Appellant established valid, fair and justified reason to terminate the Respondent.
38. In whole, the Respondent’s termination is unfair on account only of the procedure adopted. 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. (See Benjamin Langwen v National Environment Management Authority (2016) eKLR)
40. The Respondent’s termination is unfair only on account of procedure. The Court has found the reason for termination valid and justified. In Kenya Ports Authority v Festus Kipkorir Kiprotich [2014] eKLR it was held that the measures of compensation should be guided by the statutory capping at the time of termination.
41. Having held that the termination is premised on valid reasons, I deem an award of two months’ salary sufficient compensation for the unfair termination.

### **Overtime pay**

42. Although the Respondent contend that he worked overtime, no evidence was led to prove this claim. This claim thus fails on this account and is dismissed.

### **Underpayment**

43. The Respondent claims salary under payment for the period November and December, 2017 and January to December, 2018. I do agree with the Respondent that contrary to the Appellant’s assertions, salary underpayment is not a continuing injury, and hence the applicable period of limitation is three years, and not one year. For this reason, the claim is well within time.



44. The Respondent was paid a monthly salary of Kshs. 13,672.66 in 2017 and 2018. The minimum Wage Regulation applicable in 2017 provided the amount payable as Kshs. 14,420, meaning that the underpayment for the months of November and December, 2017 is a total of Kshs. 1,496/-. Further, the minimum wage applicable to the Respondent in 2018 was Kshs. 15,141 per month while he was paid Kshs. 13,672. The underpayment for the year 2018 is therefore Kshs. 17,628.
45. It then follows that the Respondent is entitled to the salary underpayment in the sum of Kshs. 19,124/- and which is hereby awarded.
46. Finally, it is not disputed that the Respondent was not given termination notice nor was he paid in lieu of the notice. This claim equally succeeds and is awarded as prayed.
47. In the upshot, the cross-appeal succeeds 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. Salary in lieu of notice at Kshs. 15,141/-
  - iv. The award on account of underpayment is upheld at Kshs. 19,124/-
  - v. The award of overtime payment is set aside entirely.
  - vi. The award of costs and interest is set aside.
  - vii. Each party will bear their own costs of the appeal and cross-appeal
  - viii. Interest at courts rate until payment in full.
48. Judgment accordingly.

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

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Ms. Anuro present for the Appellant

Mr. Otieno present for the Respondent

Erwin Ongor - Court Assistant.

