



REPUBLIC OF KENYA



KENYA LAW
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**Radar Limited v Gitahi (Appeal E132 of 2023)
[2024] KEELRC 1475 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1475 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E132 OF 2023**

**M MBARŪ, J
MARCH 20, 2024**

BETWEEN

RADAR LIMITED APPELLANT

AND

FAITH WANJIKU GITAHİ RESPONDENT

*(being an appeal from the judgment and decree of Hon. J.B. Kalo in
Mombasa CMELRC No. E502 of 2021 delivered on 30 March 2023)*

JUDGMENT

1 The appeal arises from the judgment in Mombasa Cmelrc E502 of 2021 delivered on 30 March 2023. The background to this appeal is a claim filed by the respondent on the grounds that on 26 June 2009 she was employed by the appellant as a security guard at a wage of Kshs. 18,706 per month. She would be assigned duties from Mombasa to Mariakani. She claimed that on 1st May 2020 she was placed on an unpaid leave for 60 days and the appellant cited COVID-19 as having negatively impacted them but failed to apply any criteria since other employees were left on duty. She was recalled back to work on 1st October 2020 and worked until 30 December 2020. Through letter dated 1st December 2020 delivered to the appellant on 1st January 2021, her employment was terminated on account of redundancy without the due process. The respondent claimed the following dues;

- a. One month notice pay Ksh. 18,706;
- b. Severance pay Ksh. 118,711;
- c. 12 months' compensation Ksh. 224,472;
- d. Costs and interests.



- 2 In response, the appellant's case was that employment and payment of wages was regulated under the Regulation of Wages (General) (Amendment) Orders. Most employees were placed under compulsory leave due to experiencing COVID-19. The government put a ban and stop to rail travel, the operation of SGR was very minimal and there was no need for guards where the respondent had been placed. The situation did not improve and eventually the appellant lost its tender with SGR. The respondent had signed a contract that was automatically renewed based on the contract the appellant had with a third party. The respondent was aware of these facts. The appellant's case was that it followed the due process in laying off the respondent, there was notice, labour officer was informed, a redundancy notice issued and lawful procedures undertaken. The claims made should be dismissed.
- 3 In judgment, the learned magistrate made findings that there was unfair termination of employment and made the following awards;
 - a. Notice pay Ksh. 18,706;
 - b. 10 months' compensation Ksh. 187,060;
 - c. Severance pay for a year Ksh. 102,883;
 - d. Costs and interests.
- 4 Aggrieved by the judgment, the appellant filed the appeal on the grounds that;
 1. The learned trial Magistrate erred in law and fact by making an award of one-month compensation in lieu of notice whereas notice was issued and the period worked under notice paid.
 2. The learned trial Magistrate erred in law and fact by reaching a finding that Respondent was entitled to severance package pay as well as compensation for unfair termination at the same time.
 3. The learned trial Magistrate erred in law and fact by making an award of unfair termination whereas the contract of employment of the Respondent was anchored on the life of the Appellant contract to third parties.
 4. The learned trial Magistrate erred in law and fact by failing to properly apply the circumstances of the case in the exercise of discretionary powers in awarding compensation for ten (10) months for unfair termination.
 5. The learned trial Magistrate erred in law and fact by making an award of interest from the date of filing the suit whereas the award is in the nature of general damages which cannot attract interest from the date of filing suit unlike an award for special damages.
 6. The learned trial Magistrate erred in law and fact by failing to subject the award of the court to the provisions of Section 49 (2) of the *Employment Act* 2007
 7. The learned trial Magistrate erred in law and fact by when he failed to consider the Appellants' arguments, submissions and Authorities when arriving at his decision.
5. Parties attended and agreed to address the appeal by way of written submissions.
- 6 The appellant submitted that there was no unfair termination of employment. The conduct of the respondent was not an issue that resulted in the termination of employment. The circumstances leading to the loss of work was that the Appellant lost the tender with a third party. The contract between the appellant, the third party, and the Respondent was tied up such that the termination of



the third-party contract meant that the Claimant's contract with the Respondent was also terminated. The employee contract may thereof automatically terminate without notice of termination of the company's contract with the third parties unless otherwise re-activated by a new and separate agreement. In the case of *Eric Odhiambo Owade & 2 others v Professional Cleaning Care Limited* [2018] eKLR the court held that the lapsing of the subcontract to provide cleaning services was a legitimate event that would by agreement, give rise to automatic termination of the employment contracts; and further, the fact that the respondent had an option to render the claimants redundant or to consider other options instead of relying on the automatic termination clause cannot be used to negate the clear terms agreed to by the parties. As per the circumstances in that case as they are in this case, there was no evidence that the respondent had engaged in a clandestine move to dismiss the claimants and the clear proximate cause for the termination of the contracts of service was the lapsing of the subcontract for provision of the cleaning services.

- 7 In this case the appellant followed all the procedures set by the *Employment Act*, 2007 (the *Act*). The appellant gave all the relevant notices to the respondent, there is evidence of notice to the labour office as required by law including but not limited to the one month's notice.
- 8 The appellant submitted that the trial court erred in law and fact by failing to properly apply the circumstances of the case in the exercise of discretionary powers in awarding twelve months' compensation. The factors as provided by Section 49 as read with Section 50 of the *Act* are relevant. These should include the Employee's length of service with the employer and the opportunities available to the employee for securing comparable or suitable employment with another employer. The respondent served for 11 years and had another job and hence putting these into account ought to have reduced the award.
- 9 With regard to the award in the nature of general damages and not special damages, the award of interest on the general damages should run from the date of the judgment as opposed to the date of filing this suit as it was held by the Court of Appeal. In the case of *Emmanuel Hatangimbabazi v Commissioner of Customs & Excise* [2020] eKLR the court held that in awarding interest at court rates to be computed from the date of the suit on the understanding that, if not for the seizure, the plaintiff would have earned the same money as at the date the suit was filed.
- 10 The respondent submitted that during the hearing, the appellant confirmed that it was not only at the SGR where they were deployed but also at various stations. Before the respondent was deployed at the SGR, she had been deployed elsewhere. Unlike what the appellant asserts, no notice of intention to declare the respondent redundant was served, no criteria were applied or payment of severance pay. The appellant failed to apply the provisions of Sections 40, 41, 43, 44, and 45 of the *Act*.
- 11 On the awards, the respondent submitted that, it is common ground that when a court finds termination to be unfair then notice pay is payable. Thus, there was no error at all in the said award. severance pay is a legal requirement. The Appellant confirmed that indeed the company was still operational and it was not only at the SGR where the Respondent had been engaged to work. As such there was no reason for terminating employment. The claim that the employment contract of the Respondent was anchored on the life of the Appellant's contract to third parties is not true since no evidence of the same was provided.
- 12 The respondent submitted that the award of interest, can be from the date of the judgment of the lower court.



Determination

- 13 This being a first appeal, the court is required to re-evaluate the entire records, re-assess the finding, and arrive at its conclusion. However, regard must be taken that the trial court had the opportunity to hear the witnesses giving evidence.
- 14 The issues which emerge for determination in this appeal are whether the findings that there was unfair termination of employment were justified; the award of notice pay, compensation and severance pay justified. What is apparent, the respondent in the written submissions has conceded that payment of interests on the award ought to be from the date of judgment.
- 15 What is not contested in this appeal is the employment of the respondent by the appellant as a security guard.
- 16 Through notice dated 1st December 2020, the appellant notified the respondent that employment would terminate with effect from 31st December 2020 on account of redundancy. This notice was served upon the respondent on 2nd January 2021.
- 17 The motions of Section 40(1) of the Act must be read together with Section 43(1) of the Act. one provides for an employer to declare a redundancy and the procedures thereof while the other provides that in any claim arising out of termination of a contract, the employer is required to prove the reason(s) for termination of employment and where there is failure to do so, the termination is deemed to be unfair termination within the meaning of sections 45. Section 43(2) which provides;
- 43.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
- 18 The Court of Appeal in the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR gave emphasis to these requirements that before an employee's employment can be termed as lawfully terminated, the employer is required to demonstrate that there were operational matters, a criteria was used to identify the employees to be affected and more fundamentally, there was notice and payment of terminal dues.
- 19 The appellant does not deny that the contract with third pay terminated. There was no work for the respondent to perform. However, the appellant does not challenge the fact that it had other sites it could deploy the respondent other than the SGR site. Indeed, previously, the respondent had served at other sites from Mombasa to Mariakani. No issue arose.
- 20 A reading of Section 40 of the Act, makes it clear that the appellant as the employer had a statutory right to declare redundancy provided that such an act is justified. Once it is justified, the implementation of the redundancy decision ought to have been governed by the criteria set out in Section 40 of the Act as held in the case of Kenya Union of Commercial Food & Allied Workers V British American Tobacco (K) Ltd, Cause No. 143 of 2008. Two notices ought to have issued. The general notice to all employees and the personal notice to the affected employees.
21. In the case of Africa Nazarene University v David Mutevu & 103 others [2017] eKLR the Court of Appeal emphasized on the need to issue these notices to the employees, the general and personal notices. These are legal requirements cured under the provisions of Section 40 of the Act.



- 22. In this case, the notice dated 1st December 2020, taking effect on 31st December 2020 was only served upon the respondent on 2nd January 2021. It was the personal notice terminating her employment. The motions of Section 40 of the Act were not adhered to. In the absence of a proper notice, the award of notice pay is justified. The abrupt termination of employment went contrary to Section 43 of the Act. With the general and personal notice issuing as per the law, to allow the notice period to lapse and then issue termination notice after the fact was to engage in unfair labour practices. The award of compensation is justified.
- 23. In assessing the compensation due, the respondent testified that she had worked for the appellant for over 11 years. That time was correctly put into perspective and an award of 10 months' gross wage allocated. The discretion to award up to 12 months' compensation was well applied and the learned magistrate considered all the factors at hand and allocated 10 months' gross wages in compensation.
- 24. The notice dated 1st December 2020 only offered the respondent payment for days worked. Such pay was her entitlement as she had worked over December 2020. Upon the redundancy notice, Section 40(1) required that severance be paid for every full year worked. The applied reasons justify the award of severance pay.
- 25. The findings by the learned magistrate are hereby affirmed.
- 26. The appeal herein is without merit and is dismissed. The awards of the trial court are hereby confirmed, and interests to apply from the date of the judgment. For this appeal, each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 20 DAY OF MARCH 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

