



**Brinks Security Limited v Mangu (Employment and Labour Relations  
Appeal 16 of 2022) [2024] KEELRC 739 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 739 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 16 OF 2022**

**HS WASILWA, J  
MARCH 19, 2024**

**BETWEEN**

**BRINKS SECURITY LIMITED ..... APPELLANT**

**AND**

**WYCLIFFE OSUNDWA MANGU ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arose from the Judgement of Hon. J. B Kalo delivered on 20<sup>th</sup> June, 2022 in Nakuru CMELRC Cause No. 297 of 2019. The grounds of Appeal are as follows; -
  1. That the learned Magistrate erred both in law and in fact by holding that the Respondent terminated the claimant's services, when there was no evidence to support his findings.
  2. That the learned Magistrate erred in law and in fact by finding that the claimant had proved his claim as pleaded when there was no evidence to support his findings.
  3. That the learned Magistrate erred both in law and in fact by failing to consider the evidence of The Appellant at the trial.
  4. That the learned Magistrate erred in failing to consider the Appellants submissions and entirely relying on that of the Respondent's submissions thereby making a wrong judgement.
  5. That the learned Magistrate erred in failing to address his mind to the submissions and the authorities cited by the Appellant.
  6. That the learned Magistrate erred in holding that the claimant has proved his case on a balance of probability when there was no evidence to support his findings.
2. The Appellant prayed for the following reliefs; -



- i. The appeal be allowed with costs and the claimant's suit in the lower court be dismissed with costs as against the Appellant herein.
- ii. That the costs of this Appeal be awarded to the Appellant.

### **Summary of facts**

3. The trial Court suit was instituted by the Respondent herein who was the claimant and the Appellant as the Respondent. Claimant/ Respondent herein stated that he was employed verbally by the Respondent on 31<sup>st</sup> December, 2014 as a dog handler earning a salary of kshs 9,000 From May 2015 his salary was increased to kshs. 10,700, an amount that he earned until his termination on 1<sup>st</sup> April, 2017. Therefore, that he was underpaid as per wage regulations for security guards.
4. He stated that he used to report to work every day at 6pm and clock out at 6am as such working overtime, which time was not paid for. Further that he worked during public Holidays at no extra pay.
5. He avers that upon the verbal termination, he was paid kshs 14, 694.58 as terminal dues. He maintained that no reason for termination was ever communicated, neither was he subjected to disciplinary due process.
6. The claimant therefore prayed for; one-month salary in lieu of notice, compensation for unfair termination, one annual leave, normal overtime, underpayment, Public holidays pay and costs of suit.
7. In defence, the Appellant herein admitted to employing the Respondent on 1<sup>st</sup> December, 2014 and worked until March, 2017, when the contract between the Appellant and their client- Safaricom Limited, where the Respondent was working, was termination and at that time, the Respondent herein opted to be absorbed by its successor Casa Security Limited.
8. It is averred that the guards that were not agreeable to being absorbed by their successor were directed to report to their office headquarters in Nairobi for redeployment. On 1<sup>st</sup> April, 2017, guards that had been absorbed by Casa Security Limited, cleared from the Appellant herein and returned the company's uniform and signed a certificate of release upon receiving their terminal dues. Therefore, that the Respondent herein was not terminated but joined their successor Casa Security limited.
9. Upon hearing both parties, the trial Court found that the Respondent herein was terminated by the Appellant without following the law and awarded him 6 months salary, leave not taken, March, 2017 salary, salary underpayments and overtime pay all adding up to kshs 430,583.10, together with costs of suit and interest.
10. The Appeal herein was canvassed by written submissions, with the Appellant filing on 26<sup>th</sup> January, 2024 and the Respondent filed on 20<sup>th</sup> November, 2023 and supplementary Submissions on 9<sup>th</sup> February, 2024.

### **Appellant's Submissions.**

11. The Appellant submitted on the grounds of Appeal and with regard to the first ground, it was submitted that the Respondent herein did not prove his case because; Firstly, that the Respondent indicated that they would rely on documents dated 8<sup>th</sup> September, 2019, which documents were not attached to the list filed. The Appellant, through their witness Moses Wekhanya Mauka, informed the Court that upon termination of contract between the Appellant herein and their client Safaricom, the guards that were deployed to their said shop had two option to either be absorbed by Casa Security Limited, the successor, and continue working on the said Shop or report to the Appellant's headquarters for deployment. That the Respondent herein chose the latter and was employed in April, 2017



and left employment the following year 2018, a fact which he admitted during hearing as captured in the proceedings at page 68 of the Record of Appeal. Based on this admission, the Appellant submitted that the reliefs granted were not warranted in the circumstances.

12. The Appellant submitted that the trial court erred in awarding notice pay on allegation of termination, when the Respondent admitted in hearing that he joined Casa Security Services from April, 2017 and left in 2018. He argued that this admission confirms that the Respondent herein did not report the Appellant's headquarters because, he had been absorbed into the Casa Security Services. He, thus left the Appellant's employ on securing another employment and not on termination.
13. The Appellant submitted that though the Respondent herein alleged that he never signed the certificate of release, paragraph 15 of the Memorandum of claim is contradictory as the Respondent states that he signed the said certificate of release upon receiving kshs 14,694.58 as his terminal dues. Therefore, that having admitted to signing the said release letter and receiving the terminal dues and without proof of alleged forgery of his signature, he is bound by his pleading and he is the one tasked with producing evidence of the allegations raised therein to support a contrary view.
14. On compensation for alleged unfair termination, the Appellant submitted that the trial court adopted the calculations by the Respondent herein without relying on any support in terms of payslips or legal notice, therefore that the Court erred in adopted unsubstantiated sum. Further that legal notice number 112 of 1<sup>st</sup> May, 2017, that gave the gross pay of guards at kshs 15, 374.85 came to effect on 1<sup>st</sup> May, 2017, after the Respondent herein left the Appellant's employ, as such the Court relied on an improper legal notice. The same view, was argued with regard to underpayments, in which the underpayments were not supported by any evidence and or the court relied on legal notice that was not yet in force.
15. On the award of overtime, the Appellant submitted that the trial Court at paragraph (f) awarded overtime without any basis, while at paragraph (g) the same overtime is decline on the basis that it was not proved. It was submitted on this basis that the award of overtime was contradictory and confusing. In any event, that the pay awarded had been factored in the contract, because clause (c) of the Employment contract clearly stipulates the working hours as 12 and thus the Respondent herein accepted willingly to work under the said terms and conditions and on pay agreed. Furthermore, that the claims herein such as overtime pay, house allowance, off days' pay and public holidays pay are barred by section 90 of the Employment Act having been raised in 2019, when the employment began in 2014. To support this, the Appellant relied on the case of Teresia Wanjiku Ngugi V Kiambi Institute of Science and Technology [2021] eklr, the case of Mary Kitsao Ngowa & 36 Others V Krystalline Limited [2015] eklr and the case of Sarah Wairimu Kihara v Nokia Solutions Branch Operations [2021] eklr where the Court held that :-

“The Claimant's cause of action accrued on her resignation on 6<sup>th</sup> July 2017 and despite the negotiations that were ongoing the limitation of her claim which was on wages was 12 months in terms of Section 90. She ought to have filed her suit by the 5<sup>th</sup> July 2018 and in respect of any other claim by 5<sup>th</sup> July 2020. It does not show diligence to negotiate a matter of allowances for over one year with an employer who seems as reluctant to pay as the Respondent herein. Some of the claims in respect of which she seeks recompense were incurred in 2009, 2010, 2011, 2012 and 2013. As such her claim is stale and is therefore unfit to be entertained by Court. As the Respondent did not file submissions on time as directed by the Court the suit is dismissed but with no orders as to costs i.e. each party to bear their own costs.”



16. The Appellant submitted that the trial court did not consider their submissions because several issues had pointed out in the submissions, which the court ignored. These issues include the admission of payment of the terminal dues and signing of the release letter. Further that the trial court failed to appreciate the import of section 27 of the Employment Act, that allows an employer a lee way to regulate the working hours of its employees and also the fact the legal notice the Respondent was relying on is the one of 1<sup>st</sup> May, 2017 that came to effect after the Respondent left the Appellant's employment.
17. In conclusion, the Appellant submitted that the trial Magistrate erred in both law and fact in entering judgement in favour of the Respondent herein where there was no evidence in support of the case. The Appellant, thus urged this Court to allow the Appeal with costs and dismiss the Respondent's case in the lower court with costs.

### **Respondent's Submissions**

18. The Respondent submitted from the onset that the Appellant unfairly terminated his services as held by the Magistrate Court because; Firstly, that the Appellant did not tender evidence in support of its allegations that it had a contract with Safaricom Kenya Limited and termination of the that contract thereof. Secondly, that they failed to demonstrated before the trial Court that the Respondent herein was absorbed by their alleged Successor Casa Security Limited. Thirdly, that it was not proved before the trial Court that the guards that opted for deployment were directed as such or informed of that option. It is based on these facts, that the Respondent submitted that the termination was in violation of section 35(1)(c) of the Employment Act and therefore the trial Court was justified in finding in his favour.
19. It was submitted that as per the contract of employment, Notice was a requirement before termination of employment and since the Respondent did not forfeit his right to be issued with notice, he was entitled to notice pay as awarded by the trial Court. The Respondent also urged this Court not to disturb the award of damages, arguing that the same is justified. In any event that the trial Court awarded them 6 months' salary as compensation instead of the 12 months they sought in the claim.
20. With regard to overtime pay, the Respondent submitted that the contract indeed provided that working hours will be for 12 hours, however the said contract did not make provision for overtime pay, as such the finding by the Court in awarding overtime pay is justified.
21. On the claim for Public Holidays pay, it was submitted that the employment contract clearly stipulated that the guards will be entitled to work on all days including public holidays, However that pay for these holidays was not provided, therefore that the Court ought to have awarded pay for holidays worked.
22. On underpayments award, the Respondent submitted that it is not in dispute that he was paid kshs. 10,200, a figure that was captured by the Appellant in their final dues calculations, a clear confirmation that the Claimant was underpaid contrary to the dictates of section 26(1) & (2) and Section 48(1) & (2) of the Employment Act. Furthermore, that the Appellant did not indicate to this Court that it used to pay the Respondent House Allowance as is required under section 31 of the Employment Act. Therefore, that the Court was justified in awarding him underpayments.
23. On leave pay and salary for March, 2017, it was submitted that it was not disputed that the Respondent herein was not paid March, 2017 salary what was disputed is leave pay. It was argued that although the Appellant alleged that leave pay was paid in the final dues through cheque number 0000xx, the said cheque was never received and the Appellant did not tender any evidence in form of bank statement confirming that the said cheque was ever cashed.



24. In conclusion, the Respondent submitted that all the reliefs awarded were based on evidence tendered as indicated by the Court in its judgement. He thus prayed for the Appeal herein to be dismissed with costs.
25. I have examined all evidence and submissions of the parties herein. The appellants submit that the trial Magistrate made an error in his finding that the Respondent was unfairly terminated by the appellants herein and therefore awarded in his favour.
26. This is the 1<sup>st</sup> appeal to this court and therefore this court has a mandate to re-evaluate the evidence and make a finding accordingly.
27. From the evidence of the Claimant, he averred that he was employed by the Respondent from 31<sup>st</sup> December 2014 as a dog handler and worked until 1<sup>st</sup> April, 2017 when he was terminated earning a salary of 10,700/= . He averred that he was terminated orally on 1/4/2017 and informed by his supervisor not to report to work the following day. He indicated that he was not given any notice nor a fair hearing.
28. He indicated that he was also underpaid during the period and sought to be paid for the underpayment, leave not taken, notice and compensation for the unlawful termination.
29. The Respondent/Appellants on their part indicated that the Claimant/Respondent was indeed their employee and that he was paid according to the amount the company received from their client. That the Claimant Respondent agreed to their terms.
30. The Appellant exhibited the guarding contract letter of employment dated 1/12/2014. According to the contract, the amount payable to the Respondent was not indicated but what was indicated was as follows; -
 

“The company shall pay the employee a gross salary subject to such deductions as the company may by law be required or permitted to make as provided hereunder; gross salary kshs ...../= all inclusive will be paid to you at the end of the month”.
31. The Appellant had indicated that the Respondent had accepted to be paid as per what the client was paying. This is not true according to the contract exhibited.
32. The Appellants also indicated that the Respondent accepted to leave their employment and signed a Certificate of release after he refused to join their Sister Company.
33. The Appellant has not however exhibited any evidence that they offered the Respondent a fresh contract of joining their Sister Company.
34. Section 10 (5 & 7) of the *Employment Act* states as follows:-
  5. Where any matter stipulated in subsection (1) changes, the employer shall, 'in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
  7. If in any legal proceedings an employer fails to-produce a written contract or. the written particulars prescribed in subsection the burden of proving or-disproving an alleged term of employment stipulated in the Contract shall be on the employer
35. The burden of proving the changes in the contract of the Appellant/Respondents rests on the employer, the appellant herein and I find that burden of proving the changes in the contract with the Respondent has not been discharged.



36. There is also no proof of any agreement between the two parties allowing the Appellant to pay the Respondent below the amount allowable under the law.
37. It is my finding considering the evidence as evaluated by the trial court that there was no error in the finding that the Respondent had been unfairly terminated. He was never subjected to any disciplinary hearing. He was not served with any notice and neither was he paid as per scale.
38. I see no reason advanced by the appellants to warrant my disturbance of the judgment of the Learned Magistrate. I find the appeal lacks merit and I dismiss it with costs. The Appellant shall pay costs of both the lower court and of this appeal.

**JUDGEMENT DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF MARCH, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of: -

Maragia for Claimant – present

Ndirangu for Appellant – present

Court Assistant - Fred

