



**Lavington Security Guards Ltd v Omambia (Appeal E019 of 2023)
[2024] KEELRC 566 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 566 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E019 OF 2023
CN BAARI, J
MARCH 14, 2024**

BETWEEN

LAVINGTON SECURITY GUARDS LTD APPELLANT

AND

JEREMIAH MOSOTI OMAMBIA RESPONDENT

*(Being an appeal from the Judgment of Hon Robert Mobisa Oanda (SPM)
Winam delivered on 16th March 2023 in WINAM CMELRC NO. E010 OF 2022)*

JUDGMENT

1. This judgment relates to an appeal arising from the decision of the Magistrates Court finding the Respondent's termination unfair and unlawful, and awarding the Respondent all the reliefs sought under his statement of claim.
2. The Appellant being aggrieved by the decision of the Trial Court, filed this appeal on 12th April, 2022, premised on the following grounds: -
 - i. The Learned Magistrate erred in law and in fact in failing to appreciate and properly evaluate the evidence adduced and thereby rendering judgment that is unsound in principle and not a reflection of the evidence on record.
 - ii. The Learned Magistrate erred in law and principle in failing to analyse evidence tendered and give reasons for the decision arrived at on each of the item/prayer allowed in the judgment.
 - iii. The Learned Magistrate erred in law and fact in finding that the minimum wage/salary payable to the Respondent at the time of his employment with the Appellant was Kshs 15,141.95/= which is excessively high contrary to the wage order.



- iv. The Learned Magistrate erred in law and in fact in failing to appreciate the evidence tendered by the Appellant during the trial to the effect that a redundancy notice was issued and served upon the Respondent thereby one salary in lieu of notice was not tenable in the circumstances.
 - v. The Learned Magistrate erred in law and in principle for awarding damages for loss of employment in disregard to the Respondent's evidence that he immediately engaged himself in gainful employment after leaving the Appellant's employment.
 - vi. The Learned Magistrate erred in law and in principle in making inordinately high award of Kshs 181,703.40 on account of loss of employment, pegged on an excessive salary amount contrary to the applicable wage order and principles governing such award in absence of evidence to justify that inordinately high award.
 - vii. The Learned Magistrate erred in law and in fact in making an award for underpayment which is wrong, inordinately high and in disregard to the salary the Respondent earned, the law (wage order) guiding the minimum wages and the statutory deductions.
 - viii. The Learned Magistrate erred in law and in principle in allowing a sum of Kshs 245,299.60/ = as house allowance, a figure which is excessive, wrongly arrived at mathematically and in principle and not supported by evidence.
 - ix. The Learned Magistrate erred in law and in fact in awarding leave allowance of Kshs 45,425.85 to the Respondent and blatantly disregarding and failing to consider the documentary evidence tendered by the Appellant confirming that the Respondent utilized all his leave days while in employment with the Appellant.
 - x. The Learned Magistrate erred in law and in principle in making an award of Kshs 45,425.85 on account of gratuity contrary to the principles and laws governing making of such award where the employment contract does not provide for the same.
 - xi. The Learned Magistrate erred in law and fact by ignoring the submissions by Appellant's Advocates and relying heavily on the submissions of the Respondent's Advocates and showing outright bias.
 - xii. The Learned Magistrate erred in law by displaying outright bias and totally failed to grasp the relevant jurisprudence and material evidence that was placed before him.
 - xiii. The Learned Magistrate erred in law and in fact by failing to apply the applicable law both statutory and precedents, which were placed before him and ignored the Appellant's case particularly the evidentiary and legal material presented.
3. On the 27th July, 2023, the Court granted a stay of execution on condition that the Appellant deposited half the decretal sum in Court. The Court gave further directions on 23rd October, 2023, that the appeal be canvassed by way of written submissions, and a judgment dated fixed on 6th February, 2024.
 4. Submissions were filed for both parties.

The Appellant's Submissions

5. It is the Appellant's submission that the Trial Magistrate failed to properly evaluate the evidence on record while rendering his judgment, on the basis that the judgment addressed the aspect of termination of the Respondent's employment on account of redundancy only.



6. The Appellant avers that the evidence it adduced was not considered in totality, as the Trial Magistrate made a blanket judgment over the whole claim without scrutinizing the evidence tendered against each prayer sought, and failed to properly consider issues outlined, submissions tendered and authorities in support thereof.
7. It is submitted that the business of the courts is to interpret contracts between parties and not make or amend on their behalf. It submits further, that there was an existing employment contract between the Appellant and the Respondent, which guided their relationship, and it was incumbent upon the Trial court to interpret the same as it is.
8. The Appellant further argued that the Trial Magistrate failed to analyse the evidence tendered on each of the prayers/items in the Memorandum of Claim, and also failed to give reasons for the decision arrived at. It submits further that there are no reasons backed by evidence that were advanced in the judgment to justify the final order by the court.
9. It is the Appellant's argument that the Respondent was employed in the year 2012, hence then wage orders applicable from then to the time Respondent's employment ended differed and is distinct, so that using the minimum wage for the year 2021 across as the multiplier results to an excessive amount.
10. It is its further submission that the Trial Magistrate failed to appreciate the redundancy letter dated 25th September, 2021 in support of the Respondent's termination on the basis of redundancy.
11. The Appellant submits further that the Claimant was not a member of a Trade Union, therefore, there was no need to have the redundancy notice served on a Trade Union. The Appellant states that it notified the Labour Office vide a redundancy notice served upon the County Labour Officer on 25th September, 2021. It placed reliance in the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR to buttress this position.
12. It submits that the notice of redundancy was in line with Section 40(b) of the *Employment Act* and that due procedure was followed.
13. It is the Appellant's further argument that the Trial Court did not put his mind on the provisions of the law under Section 49(4) of the *Employment Act*, before making the award on damages for loss of employment. It sought to rely in *Cargill Kenya Limited vs Mwaka & 3 Others* (Civil Appeal No, 54 of 2019) 12021 KECA 115 (KLR) (22 October 2021), to support this position.
14. The Appellant submits that the higher award made, which is the maximum award in employment matters, was unjustified for reasons that the Trial Court did not analyse the issues relating to compensation and the applicable law, hence arrived a decision not backed by law.
15. It is the Appellant's submission that the Respondent has not adduced evidence to show this Court a clear tabulation of the amount he earned vis-a-vis the amount he was supposed to earn according to the Minimum Wage Order. It further submitted that the Respondent has not illustrated how the figure pleaded has been arrived at, both in their submissions and in their Memorandum of Claim.
16. The Appellant submits further that the award on underpayment is excessive, and is beyond the scope provided under the limitation provisions of Section 90 of the *Employment Act*
17. The appellant submitted further that it led evidence to demonstrate that the Respondent proceeded for annual leave for the years he served with the Appellant, and that leave application and approved forms that show the Respondent applied, was granted and proceeded for leave were produced in evidence.



18. It submits further that the Trial Magistrate erred when he awarded leave allowance for the month of October 2021, yet the Respondent by then was already out of their employment.
19. The Appellant submits that the Respondent was contributing to NSSF, and is therefore not entitled to gratuity.
20. The Appellant submits that the judgment rendered is not comprehensive as it leaves out the submissions made by the Appellant's advocates. It submits further that its submissions before the lower court explained and justified the reasons for termination of the Respondent on the basis of Redundancy, yet the same was not considered at all by the trial magistrate.
21. It is the Appellant's prayer that the decision of the Trial Court is set aside and the claim dismissed with costs.

The Respondent's Submissions

22. The Respondent submits that his termination on account of redundancy was neither fair nor legal, for failure to follow procedure as set out by law.
23. It is the Respondent's further submission that the Appellant purported to terminate his employment on account of redundancy without compliance with the mandatory provisions of the *Employment Act*. He placed reliance in *CMC Aviation Limited v Mohammed Noor* [2015] eKLR for the holding that,

“unfair termination involves breach of statutory law and that where there is fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, amounts to unfair termination.”
24. The Respondent submits that the Appellant's conduct and procedure in declaring his services redundant is filled with glaring irregularities, all of which point to unfair termination. He submits that the loss of employment by the Respondent had an impact on his ability to provide for his family as well as rendering him jobless, and is therefore immaterial whether the Respondent was able to find another job after being unfairly terminated.
25. It is his submission that having found that the purported redundancy was unlawful and unfair, the Respondent becomes eligible for the reliefs provided by Section 49(1)(c) of the *Employment Act*, subject to the guidance provided by Section 49(4) of the Act.
26. The Respondent argued that the notice given by the Appellant was less than one month, and thus ineffective as the law is clear that an employer ought to issue a notice not less than one month to an employee whose services they intend to terminate on grounds of redundancy. The Respondent is therefore entitled to one month's salary in lieu of notice.
27. It is submitted for the Respondent that the Learned Trial Magistrate was right to hold that the minimum wage payable to the Respondent at the time of his employment was Kshs.15,141.95.
28. The Respondent submits that he is entitled to leave allowance from March, 2018 to October, 2021, and accrued house allowance.
29. The Respondent urges this Court not to interfere with the discretion of the Trial Court. It submits further that the appeal herein, is devoid of merit and should be dismissed with costs to the Respondent.



Analysis and Determination

30. Upon careful consideration of the Appeal herein, the fourteen grounds of appeal are condensed into the following two grounds: -
- i. Whether the Trial court's finding of an unlawful and unfair termination on account of redundancy was supported by law and evidence tendered.
 - ii. Whether the Respondent deserved the awards handed out by the trial court.
- Whether the Trial Court's finding of an unlawful and unfair termination on account of redundancy was supported by law and evidence tendered.
31. The Respondent's case, is that he was employed by the Appellant in December, 2012, and that he worked diligently until 1st October, 2021, when his services were abruptly terminated.
32. His testimony before the Trial Court, is that he was carrying on his duties as usual on 25th September, 2021, when the Appellant informed him that his assignment was over.
33. The Appellant on its part, refuted the Respondent's claim of unfair termination, and affirmed that he was rightfully declared redundant. It averred that on 13th September, 2021, its contract for supply of security services to KALRO was terminated, and which made it untenable to continue the Respondent's employment.
34. The Appellant contends that they issued a redundancy notice dated 25th September, 2021, and which was to take effect on 1st October, 2021. It was their case that upon issuance of this notice, the Respondent left the premises and never returned their property in his possession.
35. In finding the termination unlawful, the Learned Magistrate cited the shortness of the notice, arguing that the requirement that the Respondent should not report to work after the 25th September, 2021 redundancy notice, amounted to an ambush.
36. The redundancy notice dated 25th September, 2021, and subject of this suit, states that the services of the Respondent were being terminated on account of termination of the Appellant's contract with KALRO. It then goes ahead to declare the Respondent redundant as from 1/10/2021 citing lack of revenue.
37. Termination on account of redundancy is subject to the provisions of Section 40 of the *Employment Act*. Section 2 of the *Employment Act* defines redundancy as the loss of employment, occupation, job or career by involuntary means, through no fault of the employee. It is termination at the initiative of the employer.
38. It is generally settled that redundancy is a fair reason to terminate and to determine the legality of a redundancy, the court examines the bona fides and the integrity of the process.
39. The procedure of a redundancy is that spelt out under Section 40 of the *Employment Act*. The process must be procedurally fair and substantively justified through adherence to the provisions of Sections 43, and 45 of the *Employment Act*.
40. The seven-step redundancy procedure detailed in Section 40(1) is couched in mandatory terms, and an employer has the responsibility to comply with all the 7 steps. (See Kenya Union of Journalists and Allied Workers v. Nation Media Group (2013) eKLR)



41. Section 40 states:

“(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
- (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
- (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- (f) the employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and
- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.”

42. On procedure, the Respondent was issued notice of redundancy on 25th September, 2021, and which notice was to take effect on 1st October, 2021, barely five (5) days thereafter. This without doubt violated the mandatory requirement under Section 40 that demands that an employer issues not less than a month’s notice to the employee’s trade union, or to the employee personally and copied to the labour officer, where the employee is not a member of a union. (See *Thomas De La Rue (k) Ltd*)

43. In *Gerrishom Mukhutsi Obayo vs Dsv Air and Sea Ltd* (2018) eKLR, cited by the Respondent, the Court held that a valid redundancy required service of notice at least a month prior and in the presence of the labour officer or union representative and the employee.

44. Further, the Court of Appeal in *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (KLR) stated that there must be notification of the reasons for, and the extent of the intended redundancy not less than a month prior to the date of the intended termination on account of redundancy.

45. The redundancy notice issued to the Respondent indicates the reasons for redundancy. It however falls short on the notice period, having been issued just 5 days prior to the redundancy. There is also no evidence that the labour officer was notified of the intention to declare the Respondent redundant.



46. In the Cargill Kenya Limited case (supra), the rationale for the notice was delineated as follows:

“The purpose of the notice under section 40(1)(a) and (b) of the *Employment Act*, was to give the parties an opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment. The consultations were meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it was unavoidable. That meant that if parties put their heads together, chances were that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy was inevitable, measures should have been taken to ensure that as little hardship as possible was caused to the affected employees.”

47. The short notice given by the Appellant violated the mandatory requirements of Section 40 of the *Employment Act*. In the premise, I find and hold that the Trial Court did not err in finding the Respondent’s termination unfair, and I proceed to uphold the finding of the trial court.

Whether the Respondent deserved the awards handed out by the Trial Court.

48. On finding the Respondent’s termination unlawful and unfair, the Trial Court proceeded to award all the remedies sought under the Respondent’s statement of claim.

49. As correctly submitted by the Appellant, the Trial Court did not explain any of the reliefs awarded. It proceeded instead, to make a blanket award premised solely on the finding of an unfair termination.

50. To determine whether or not the Respondent deserved the awards, I will proceed to analyse each award and reach my own finding on the same.

Compensation for unfair termination

51. The Respondent sought the equivalent of 12 months’ salary for the unfair termination. He worked for the Appellant for about 3 years. The Trial Court awarded him 12 months’ salary as prayed without assigning any reason for the award.

52. In *Kenfreight (EA) Limited v Benson K. Nguti* (2016) eKLR, the Supreme Court observed that the *Employment Act* provides for a number of remedies for unlawful or wrongful termination under Section 49, and it is up to the judge to exercise his or her discretion to determine whether to allow any or all of the remedies provided.

53. Further in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the Court of appeal pointed out that an award of the maximum of 12 months’ pay must be based on sound judicial principles, and that the Trial Judge must justify or explain why a Claimant is entitled to the maximum award.

54. Although the Respondent indicated that he is currently not employed (as at the time of testifying), this Court is by law called upon to consider the opportunities available to the employee to secure comparable employment as well as the effort the employee has made to mitigate his losses.

55. Considering that the Respondent would easily have secured comparable employment, coupled with his failure to show that he made effort to mitigate loses occasioned by the unfair termination on account of redundancy, I hold that the Respondent has not proved a case for maximum compensation, and I deem an award of eight (8) months salary sufficient compensation for the unfair termination.



Underpayment

56. The Respondent sought a total of Kshs 135,406.8/= in underpayments. It was his contention that he was entitled to a salary of Kshs 15,141.95/=:, but was instead, paid Kshs 9,500 per month between March, 2018 and March, 2020.
57. In his testimony, the Respondent affirmed that he was paid Kshs 9,500 per month. The Appellant's witness who is also their human resource manager, averred that the Respondent's monthly salary was Kshs 10,500/=
58. Underpayment of wages occurs when the employer pays wages below the contractually agreed rates or below the prescribed minimum wages under the Labour Institutions Act. The Respondent made reference to the Regulation Amendment Order of 2018, which provides that a night watchman is entitled to Kshs 15,141.95/= per month.
59. The pay slips produced in evidence indicates the Respondent's salary as Kshs 10,500/= consolidated. This amounts to an underpayment of Kshs 4,641 per month.
60. The Respondent filed his suit in January, 2022. The claim for under payment in respect of March, 2018 to January, 2019 is statute barred by virtue of Section 90 of the Employment Act. The valid claim is thus only between January 2019 to March, 2021 and which is awarded in the sum of Kshs. 111,384/-

Payment in lieu of notice

61. Having found the redundancy unprocedural and in the absence of evidence that the Respondent was issued sufficient notice or paid in lieu of notice, the award of 1 month's salary in lieu of notice is found merited and the award of the Trial Court is upheld.

House allowance

62. The Kshs 15,141.95 provided for in the REGULATION OF WAGES (GENERAL) (AMENDMENT) ORDER, 2018 is inclusive of house allowance. The Respondent is therefore not entitled to any award under this head. The award by the trial court is therefore set aside.

Leave allowance

63. The Respondent sought Kshs 45,425.85 on account of leave allowance. The Appellant has provided leave application forms showing that the Respondent utilized his leave days.
64. In view of the foregoing, I find this claim unmerited, and the award by the Trial Court in this respect is set aside.

Gratuity

65. The Claimant did not lead any evidence for an award under this head. No details of his terms of service or contract were availed to indicate that he was entitled to gratuity.
66. The record further confirms that the Respondent and the employer contributed to the NSSF.
67. The award by the Trial Court is set aside in its entirety.

Conclusion and Disposition

68. In light of the foregoing, the appeal partially succeeds and orders issued as follows: -



- a. The award of 12 months' salary as compensation for unfair termination is set aside, and substituted therewith 8 months' salary for unfair termination at Kshs 121,135.60/-
- b. The award of Underpayment is upheld at Kshs 111,384/-
- c. The award on account of pay in lieu of notice is upheld at Kshs 15,141.95
- d. The awards of house allowance, leave allowance and gratuity are set aside in entirety.
- e. The Appellant to bear half the costs of the suit before the lower court.
- f. The appeal being partially successful, I order that each party bears their own costs of the appeal.

69. It is ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 14TH DAY OF MARCH, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Kiptoon present for the Appellant

N/A for the Respondent

Erwin Ongor - Court Assistant

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