



REPUBLIC OF KENYA



KENYA LAW
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**Radar Limited v Ali & another (Appeal E015 & E014 of 2023
(Consolidated)) [2024] KEELRC 1421 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1421 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E015 & E014 OF 2023 (CONSOLIDATED)**

**M MBARŪ, J
MARCH 14, 2024**

BETWEEN

RADAR LIMITED APPELLANT

AND

MWINYI HAMISI SARE ALI 1ST RESPONDENT

MBWANA BAKARI KUFAA 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. R.M. Amwayi in
Kaloleni CMELRC No. E004 of 2021 delivered on 26 July 2023)*

JUDGMENT

1. ELRCA No. E015 of 2023. The finding herein applies to ELRCA No. E014 of 2023.
2. The appeals herein were consolidated for hearing and determination. The lead file is
3. The background to this appeal is a claim filed by the respondent herein in Kaloleni CMELRC No. E004 of 2021 on the grounds that on 1st August 2015, he was employed by the appellant as a security guard earning Kshs. 17,966 per month. on 31st October 2018, his employment was terminated without due process or payment of his terminal dues. He claimed the following;
 - a) One-month notice pays Kshs. 17,966;
 - b) Unpaid leave earned from 2015 to 2018;
 - c) Unpaid holidays from 2015 to 2018;
 - d) House allowance for 2 years Kshs. 34,884;
 - e) Severance pay for 3 years Kshs. 32,694.75;

- f) 12 months' compensation Kshs. 215,859;
 - g) Costs.
4. The appellant filed a response and admitted that the respondent was employed as a guard and his wage was regulated under the Regulation of Wages (General) (Amendment) Orders and inclusive of house allowance. The appellant issued notice terminating employment in accordance with Section 35 of the Employment Act, 2007 (the Act). At the time employment lapsed, the respondent had not worked on any public holiday and used all leave days. Severance pay is not due as this was not a redundancy, the wage paid was inclusive of the house allowance and claims going back to 3 years should be capped.
 5. The learned magistrate delivered judgment on 26 July 2023 with a finding that there was unfair termination of employment and awarded maximum compensation, notice pay, unpaid leave days, and severance pay together with costs and interests.
 6. Aggrieved by the judgment, the appellant filed this appeal and challenged the award of notice pay on the grounds that notice was issued to the respondent. That there was an error in awarding leave pay contrary to the provisions of Section 28(2) of the Act. The award of severance pay was in error since there was no redundancy declared and employment was terminated after notice was issued. The award of 12 months' compensation was without reason and excessive and failed to consider the arguments made in response.
 7. The appellant is seeking that the judgment of the trial court be set aside with costs.
 8. Both parties attended and agreed to address the appeal by way of written submissions.
 9. Only the appellant complied.
 10. The appellant submitted that they retained the respondent on a contract of service as a security guard from 30 June 2016 to 31st October 2018 when employment was terminated following the Act. A one-month notice issued through a letter dated 1st October 2018 and gave reasons for termination of employment. However, the trial court ordered that there was unfair termination of employment and notice and compensation should be paid which was in error as the appellant had followed the law.
 11. The respondent admitted that he went on leave for 2 years. The award for untaken leave days was therefore not justified and should be set aside. In *Togom v Radar Limited* ELRCA No. E003 of 2023 the court held that under ILO Convention 132 (Holiday with Pay Convention (revised) 1970, (132), the operative word is consultation, and therefore, an employee must submit to the employer an application for leave or their intention to proceed on leave. Without evidence of the employee applying for leave, a claim for untaken leave should be dismissed.
 12. Section 28(4) of the Act requires an employee to take leave within 18 months and should not accumulate such days without the approval of the employer as held in *Radar Limited v Daniel Jom Machera* [2022] eKLR. Hence, Section 28 outlines how accumulated leave days can be carried forward by an employee as held in *Luka Mbuvi v Economic Industries Limited* [2020] eKLR.
 13. The appellant submitted that termination of employment was lawful and justified. The conduct of the respondent was not an issue. Loss of work resulted from the fact that the appellant lost the contract tender with a third party which fact was within the knowledge of the respondent. There was no work for the respondent. This was a fair reason leading to termination of employment as held in *Jared Mangera & 11 others v Professional Clean Care Limited* [208] eKLR. The employment of the respondent was anchored on the availability of work from third-party contracts. In the case of *Eric Odhiambo Owade & 2 others v Professional Cleaning Care Limited* [2018] eKLR the court addressed

a similar matter and where the employer was faced with the predicament of loss of contract held that the reasons for termination of employment was justified. The appellant considered operational reasons leading to the issuance of notice to the respondent and hence the finding that there was unfair termination of employment and payment of severance pay were not justified. The appeal should be allowed and the judgment of the trial court set aside.

Determination

14. This is a first appeal. The court is required to re-evaluate the entire record, re-assess the evidence and findings, and make its conclusions. However, regard must be taken that the trial court had occasion to listen and hear the witnesses in evidence.
15. The issues which arise for determination in this appeal are whether the findings by the trial court are proper; whether the awards challenged in this appeal are with merit and whether the appeal should be allowed as prayed.
16. The fact of employment from 1st August 2015 to 31st October 2018 is not contested. A Certificate of Service issued by the appellant to the respondent dated 1st November 2018 is evidence of the fact of employment.
17. Through notice dated 1st October 2018, the appellant informed the respondent that his employment would be terminated from 1st November 2018 but no particular reason is assigned to such action save to tell him that he had been a good employee. In the written submissions herein, the appellant's case is that they lost a third-party contract leading to loss of work for the respondent, a fact that the employee was aware of.
18. Such loss of third-party contract and loss of employment for the respondent is not apparent in the court reading of the notice terminating employment. Even where notice to terminate employment was issued under Section 35 of the Act, the motions of Sections 43 and 45 of the Act required the appellant to give reasons for such action. Where indeed the loss of employment was due to operational requirements and loss of third party contract, such was a sufficient reason to give and allowed under Section 43(2) of the Act.
19. The reasons to be given are the ones the employer genuinely believes to exist at the time and leading to loss of employment. Such must be stated in the notice terminating employment. In proving the reasons for termination of employment under section 43 of the Act, the employer is entitled to plead matters that he genuinely believed to exist and which would, if they were in fact in existence, provide valid grounds for terminating the employment of the subject employee as held in [*Matsesbo v Newton \(Cause 9 of 2019\)*](#) [2022] eKLR.
20. To issue a blank notice to the employee without setting out the reasons, according to Section 45 of the Act, that results in unfair termination of employment. The finding by the learned magistrate in this regard cannot be faulted.
21. However, in awarding compensation, great regard must be given to the provisions of Section 45(2) of the Act. The efforts taken by the employer to comply with the law. The prompt payment of terminal dues. All these must be cumulatively taken into account.
22. The rationale is that; the award of the maximum 12-month compensation must address the exceptional circumstances of the case that allow for the highest available remedy. The award of 12 months' compensation must be for stated reasons and not as a matter of course as held in [*Gas Kenya Limited v Odhiambo \(Appeal E006 of 2022\)*](#) [2022] eKLR.

23. In the case of Alfred Muthomi & 2 Others v National Bank of Kenya Limited [2018] eKLR the Court held that in granting 12 months' salary as compensation for unfair termination, it considered the Claimant's long service. In the case of Teachers Service Commission v Timothy Onyango Olale [2022] eKLR, the court reduced the award of 12 months' compensation as there were no exceptional reasons given to warrant the maximum award.
24. Hence, the trial court ought to have assessed the circumstances of this case before allocating the award of compensation. The respondent worked from 1st August 2015 to 31st October 2018. A period of 3 years. An award of three (3) months compensation would be an appropriate award in this case at Kshs. 53,460.
25. Concerning the award of severance pay, as outlined above, the appellant did not assign any reason leading to loss of employment. The fact of loss of third party contract is not assigned. With the loss of employment and the same found unfair, there was no declaration of redundancy to justify the award of severance pay. This is not apparent from the court reading of the notice dated 1st October 2018.
26. On the award of notice pay, indeed the appellant issued notice and allowed the respondent to serve up to the end of it. In evidence, the record is clear to the extent that the respondent received the termination notice. Under Section 35 of the Act, payment in lieu of notice is double allocation and is not justified.
27. On the question of taking annual leave, this is a right secured under Section 28 of the Act. The employer must keep work records and produce them once a suit is filed.
28. In his evidence before the trial court on 27 September 2022, the respondent testified that he knew he had a right to take annual leave but did not see anyone applying for leave. In such circumstances, Section 28 of the Act creates a duty on the employer to allow the employee to take annual leave. The employee has an equal duty to apply for leave and taking of annual leave cannot be accumulated beyond 18 months unless the employer has approved or the employee can demonstrate that he made the application but this was declined by the employer.
29. On the claim for untaken leave days for 3 years, even though the appellant had pleaded operation of Section 90 of the Act, the payment in lieu of untaken leave days goes back for 18 months only.
30. The respondent was earning a basic wage of Kshs. 17,820. For 18 months he accrued 33 leave days and the payment in lieu thereof is Kshs. 19,602.
31. On the award of costs, under Section 12(4) of the *Employment and Labour Relations Court Act, 2011* there are discretionary. However, in the exercise of such discretion, the court must apply judicial principles of ensuring that the ends of justice are met in making the award for costs. In employment claims, once the employee is restored and paid his dues, costs do not follow the cause. Unless there is evidence of the employer being grossly unfair to the employee where there is unfairness and unprocedural termination of employment, the award of costs should not be issued.
32. The costs awarded by the trial court were on the basis that the claims made were largely successful. On the above analysis, these awards are reviewed and costs ought not to have been issued. On this basis, award on costs is hereby set aside. For this appeal, each party has to bear its costs.
33. Accordingly, the appeal partially succeeded; judgment in Kaloleni CMELRC No. E005 of 2021 is hereby reviewed in the following terms;
 - a. Compensation awarded at Kshs. 53,460;

b. Leave pay Kshs. 19,602;

c. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 14 DAY OF MARCH 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

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