Wepukhulu v Tofada Security Services Limited (Appeal E102 of 2023) [2024] KEELRC 1405 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 1405 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E102 OF 2023

M MBARŨ, J

MARCH 14, 2024

BETWEEN

GABRIL WEPUKHULU .... CLAIMANT

AND

TOFADA SECURITY SERVICES LIMITED .... RESPONDENT

(Being an appeal from the judgment of Hon. Chembani L. delivered in Mombasa CMELRC No. E347 of 2022 on 16 August 2023)

JUDGMENT

1. The background of this appeal is a claim filed by the appellant in Mombasa CMELRC No. E347 of 2022 on the grounds that he was employed by the respondent as a night security guard on 31st January 2020 at a gross wage of Kshs. 11,000 per month. He worked until 21st July 2020 at 4 pm. He inspected the premises and found one door opened which was unusual. He confirmed that one staff member was still in the office. At 6 am when his shift ended, he left for home but was called by his supervisor and questioned about events of the previous evening. On 23 June 202 when he reported to work, his supervisor Mr Omuse said the manager had instructed him not to let the appellant at work and that his services were no longer required. His employment was terminated without notice, hearing, or payment of terminal dues. He claimed that he was underpaid, and not allowed public holidays, off days, overtime, or his unserved contract terms. He claimed as follows;

    a) Notice pay Kshs. 15,141.95;

    b) Salary for June Kshs. 15,141.95;

    c) Underpayment of Kshs. 20,709.95;

    d) Off days Kshs. 14,092;

e) Overtime Kshs. 99,092;

f) Public holidays Kshs. 5,345.57;

g) Unspent contract term Kshs. 302,839;

h) 12 months' compensation Kshs. 181,703.40;

i) Certificate of service;

j) Costs.

2. In reply, the respondent admitted that the appellant was issued with a written contract. His work hours were 6 pm to 6 am but failed to be diligent in his duties. On 21st June 2020, he was not working as assigned. His duties included inspecting the allocated premises securing them and ensuring all doors were locked. The appellant failed to report on duty as required which was a gross misconduct. His employment was terminated for leaving his duty station unmanned or being relieved, being absent on duty, failing to make a report after duty, and failing to report on duty on time. The appellant was paid wages as regulated by the government and his claims are without merit.

3. The learned magistrate delivered judgment on 16 August 2023 with findings that there was no unfair termination of employment and the remedies sought were not justified. The claim was dismissed and each party was directed to bear its costs.

4. Aggrieved by the judgment, the appellant filed this appeal on the grounds that the trial court failed to appreciate that the respondent as the employer had the burden of proof and justify reasons for termination of employment. The evidence submitted was not considered and the fact that there were sufficient grounds to demonstrate a lack of fair procedure. The judgment should be set aside the judgment entered as pleaded in the Memorandum of Claim.

5. Both parties attended and agreed to address the appeal by way of written submissions.

6. The appellant submitted that in the case of Kiptum Nyaoke v Kenya Post Office Savings Bank [2022] eKLR the court held that to make a determination of fairness or lack thereof in the termination process, the court is guided by the provisions of Sections 41, 43, 45 and 47 of the *Employment Act*, 2007. The issue of fair process and substantive justification must be addressed in terms of Section 41 of the Act.

7. The appellant also submitted that on the question of substantive justification test, Sections 43, 45(2) and 47(5) of the Act places on the employer a legal and evidential burden of proof of reasons for termination where an employer alleges unfair termination. The provisions of Section 43 require that an employer proves the reasons it terminated the services of an employee, and if she fails, the termination shall be deemed to be unfair. In the case of Milano Electronics Limited v Dickson Nyasi Muhaso [2021] Eklr, the court held that the effect of sections 43, 45 and 47 of the Act is to place the burden of justifying a termination on the employer. All that the law requires of an employee is to provide prima facie evidence of a wrongful termination. Once this is done, it is for the employer to provide evidence to demonstrate that the separation was lawful. To this extent, the *Employment Act* has reversed the concept of burden of proof as encapsulated in section 107 of the *Evidence Act* so as to adopt the reverse burden of proof.

8. The respondent submitted that in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR the court held that the appellant had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1) of the Act to prove the

reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of the Act.

9. In the case of Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR, the court in addressing the question of desertion of an employee held that;

> Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee's duties.
>
> The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable inquiries as to the absence (post, email, phone calls, colleagues, neighbours or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances. And a hearing may be necessary.

10. In the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR, in determining whether the appellant's employment was unfairly terminated, the Court of Appeal noted that,

> One may indeed wonder what the appellant did after the alleged termination of his employment. He certainly did not make any immediate protest in writing or at all, either to the respondent, the labour officer or even his workmate, John Elayesa Likhalami who testified on his behalf. John testified that he only heard from undisclosed sources that the appellant had been dismissed. It was only in March 2012, more than five months later that the appellant's lawyer addressed a demand letter to the respondents. Three more months later in June 2012, he filed the claim in the Industrial Court. This is hardly the conduct of an employee whose services were summarily and rudely terminated. On a balance of probability, he was not pushed. He jumped.

11. On the claim that there was redundancy, the respondent submitted that in the case of *Walwanda v Radar Security Limited (Cause 263 of 2018*) [2022] KEELRC 1217(KLR) the court held that the parties were entitled to contract as per clause 8.3 of the temporary employment contract as it was within the statutory minimum terms and conditions of service. Section 35(1) of the Act requires issuance of notice prior to termination of a contract of service. The parties entered into a contract to perform specific work, namely, guarding services as may be available when the respondent was contracted by the third parties. While the situation looked like and was in fact manifestly a redundancy, the specific clause 8.3 was a legitimate overriding term and condition of service contemplated under section 35(1) of the Act. The Court therefore finds that the termination was within that contractual term rather than a termination on account of redundancy.

Determination

12. This is a first appeal that requires the court to re-evaluate the record re-assess the findings and come up with its conclusions. However, take into account that the trial court had the chance to hear the parties in evidence.

13. Through a contract dated 1st April 2020, the respondent employed the appellant as a security guard. His work hours were stated to be in a shift system, shift one from 6 am to 6pm and shift two from 6 pm to 6 am. His work site was at the Court of Appeal. The wage was agreed at Kshs. 11,000 per month.

14. The appellant's case is that on 23 June 2020, he was dismissed by his supervisor Mr Omuse upon being instructed by the manager to do so.

15. In response to the claim, the respondent's case was that the appellant was of gross misconduct which led him to abscond duty after being questioned about failure to report to work. The particulars of gross misconduct were given to neglect of duty, refusing to submit a report, and leaving duty without a reliever.

16. Upon demand to pay terminal dues, the respondent replied through a letter dated 6 April 2022 that the respondent had a contract with the Judiciary running from 1st April 2020 and could not have employed the appellant on 31st January 2020. The guards had given work hours for 12 hours each day and on 21st June 2020 the appellant was found in the kitchen of the Court of Appeal taking tea by a court clerk, Josphat Tinga who was working late. The appellant opted to run away. He never returned to work.

17. The appellant testified before the trial court that he was employed in April 2020 on a two-year contract. On 21st June 2020, it was Sunday when he found a court staff in the office and he went to check. The next day his employment was terminated.

18. The entire record has no letter terminating employment. Where indeed the appellant absconded duty as alleged by the respondent, such as gross misconduct and contrary to Section 44(4)(a) of the *Employment Act*, 2007 (the Act). The respondent the employer had a duty to address such misconduct through the procedures outlined under Section 41(2) of the Act.

19. Without any letter terminating employment, the respondent had failed in its legal duty to end employment over alleged secondment of duty, the word of the appellant as the employee stands correct. That he was directed not to return to duty after 21st June 2020 after finding a door open in the premises he was guarding at the Court of Appeal. The motions of the law are outlined in the case of Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR where the Court of Appeal held that;

20. In analysing the evidence, the trial court gave reliance to the provisions of Section 107 of the *Evidence Act*. that whoever desires any court to give judgment as to any law rights or liability dependent on the existence of facts which he asserts must prove those facts exists. The trial court also relied on the provisions of Section 47(%0 of the Act about the burden of proof in a case of alleged unfair termination of employment. He (the appellant) did not produce any letter of termination from the respondent.

21. According to the provisions of Section 20 of the Employment and *Labour Relations Act*, 2011, the technical applications of the *Evidence Act* are removed from employment claims. Unlike the legal threshold under the *Evidence Act*, under Section 47(5) of the *Employment Act*, 2007 the burden is on the employee to claim unfair termination while the employer must disprove the employee's assertions. Consequently, absent a cogent explanation by the employer justifying the action taken, the law entitles the court to find in favour of the employee. Section 47(5) of the Act hence places the burden of proof upon the employer to justify the reasons leading to termination of employment.

22. In the case of Nanyuki Water and Sewerage Company Ltd v Ntiritu (2018) eKLR the court held that where an employer fails to prove or disprove a contested term of the contract of employment, the court is entitled to hold this against such an employer.

23. In the case of Gumba v Kenya Medical Supplies Authority [2014] eKLR the court held that the procedural requirements before termination of employment which the employer must prove are, provision of notice; supply of reasons for the intended termination; guarantee of the right to be heard by the party adversely affected by the intended termination; and guarantee of access to a reasoned decision to terminate.

24. In the case of Jalang'o v Amicabre Travel Safaris Limited [2014] eKLR the court held that before termination of employment, the employer must have substantive justification and grounds that justify termination of employment. These may include incompetence; physical incapacity to execute the assigned task; and gross misconduct.

25. Without notice terminating employment being issued, the employee can move court under Section 47(5) of the Act and assert that employment terminated unfairly for lack of both procedural and substantive fairness. To this extent, the findings by the trial court that the appellant was at fault and that he failed to prove his case cannot stand. This was a misapplication of Section 47(5) of the Act and the fact that the *Evidence Act* is far removed from proceedings before the Court.

26. The respondent failed to discharge its burden under Section 47(5) of the Act read together with Sections 43 and 44 thereof. An employee cannot terminate his employment. Where the appellant is alleged to have absconded duty, the respondent as the employer had the legal duty to issue a notice under Sections 44 and 41(2) of the Act to allow the appellant to attend and defend himself. Where the appellant failed to attend as required, Section 18(5)(b) of the Act allowed the respondent to serve notice upon the Labour Officer.

27. Without discharging such a burden, the appellant's employment was terminated unfairly.

Notice pay and compensation is due.

28. The appellant worked from April to June 2020. He was not honest in his memorandum of Claim when he claimed to have started work in January 2020 because in his evidence-in-chief he confirmed that he started working for the respondent in April 2020. The respondent also confirmed that its contract with the judiciary commenced in April 2020 and could not have engaged the appellant before such date.

29. For the two months at work, compensation at one month is hereby found appropriate.

30. Notice pay is due where there is both procedural and substantive unfairness.

31. The claimant is seeking underpayment of wages. A security guard working in Mombasa from April to June 2020 had a wage of Kshs. 15,141.95. The house allowance due is 15% of this basic wage at Kshs. 2,271 total due Kshs. 17,412. The underpayment is Kshs. 6,412.29. for April and May 2020, the underpayment is Kshs. 12,824.57.

    Pay for 21 days in June 2020 is Kshs. 12,188.40 inclusive of house allowance.

    Notice pay is Kshs. 17,412.

    Compensation is Kshs. 17,412.

32. In the claim for overtime, the appellant was a security guard. Under the Regulations of Wages Protective Security Services Order, a guard has 60 hours each week plus a rest day. For rest days taken, the employer has the burden to produce work records that the employee enjoyed such rest days in terms of Section 27 of the Act. In this case, the respondent as the employer failed to abide by the provisions of Section 10(6) and (7) of the Act. From April to 21 June 2020, the appellant was entitled to 11 rest/off days.

    At the gross wage of ksh.17, 412 the due compensation is Kshs. 6,385.

33. The claim for work during public holidays is not particularised. Public holidays are all gazetted by the Minister and cannot be applied generally.

34. On the claim for full contract term, the employment contract issued to the appellant had provisions for termination of employment. The unfair termination of employment is addressed and redressed. The appellant must secure new employment and apply his skills.

35. A certificate of service should be issued under Section 51 of the Act. Upon clearance, the respondent should issue the due certificate.

36. On costs, the findings that there was no procedural and substantive justice goes to the heart of unfair termination of employment leading to this proceeding. The respondent failed to address basic minimums under the law. costs are due and hereby assessed at Kshs. 20,000 for this appeal.

37. Accordingly, the appeal is with merit. Judgment in Mombasa CMELRC No. E347 of 2022 is hereby set aside and substituted with the following orders;

    a) Employment of the appellant terminated unfairly;

    b) Compensation awarded at Kshs. 17,412;

    c) Notice pay Kshs. 17,412;

    d) Underpayments Kshs. 12,824.57;

    e) Off days Kshs. 6,385;

    f) Certificate of service to be issued upon clearance;

    g) Costs of the appeal awarded at Kshs. 20,000.

Delivered in open court at Mombasa this 14 day of March 2024.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

.... and ....

Page **4** of **4**