



**Radar Limited v Nyauma & 4 others (Appeal E019, E018, E020, E021 & E022 of 2023
(Consolidated)) [2024] KEELRC 1422 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1422 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E019, E018, E020, E021 & E022 OF 2023 (CONSOLIDATED)**

**M MBARŪ, J
APRIL 26, 2024**

BETWEEN

RADAR LIMITED APPELLANT

AND

KOMBO NYAUMA 1ST RESPONDENT

E018 SIRI MBWANA MANDARA 2ND RESPONDENT

E020 PATRICK KEVERENGE 3RD RESPONDENT

E021 STEPHEN WITA GITHONGO 4TH RESPONDENT

E022 PETER OMARE ONCHIEKU 5TH RESPONDENT

*(Being an appeal from the judgment of Hon. R. M. Amwanyi in
Kaloleni CMELRC No.E010 of 2021 delivered on 20 September 2023)*

JUDGMENT

1. The appeals herein are consolidated under ELRCA E018 of 2023 to include ELRCA E019 of 2023, ELRCA E020 of 2023, ELRCA E021 of 2023, and ELRCA E022 of 2023. The parties attended and agreed to place the appeals together for hearing and determination as they relate to the same cause of action and by the same appellant. Upon retreat to address the appeal, the court applied ELRCA E019 of 2023 as the lead file. Findings thereof shall apply to the consolidated files.
2. The appeal arises from the judgment in Kaloleni CMELRC No.E010 of 2021 delivered on 20 September 2023. The appellant is seeking that the judgment of the trial court be set aside with costs.
3. The background of the appeal is a claim filed by the respondent on the grounds that he was employed by the appellant as a security guard on 1st October 2013 earning a basic wage of Ksh.17, 966 per



month at the time his employment was terminated. On 15 October 2018, the appellant terminated his employment without justification or payment of terminal dues. He claimed the following;

- a. Notice pay Ksh.17,066;
 - b. Unpaid leave days
 - 2013, 523.60 x 21 days Ksh.10, 995.60
 - 2014, 523.60 x 21 days Ksh.10, 995.60
 - 2015, 586.40 x 21 days Ksh.12, 313.40
 - 2016, 586.40 x 21 days Ksh.12, 313, 40
 - 2017, 691.95 x 21 days Ksh.14, 530.95
 - 2018, 726.55 x 21 days Ksh.15, 257.55
 - c. Unpaid holidays;
 - 2013 19 days;
 - 2014, 11 days;
 - 2015, 11 days;
 - 2016, 12 days;
 - 2017, 16 days;
 2018. 13 days.
 - d. House allowances Ksh.1,026 x 12 months x 5 years + Ksh.10,260 total Ksh.61,560;
 - e. Severance pay for 5 years Ksh.54,491.25;
 - f. Compensation for unfair termination of employment Ksh.215,592;
 - g. Costs.
4. In response, the appellant admitted that the respondent was employed as a security guard and his wages were paid guided by the Regulation of Wages (General) (Amendment) Orders for all the separate years that he was employed. The wage paid was indicative of the house allowance as provided under the Wage Orders for each year. The respondent was issued with a termination letter of his employment and issued notice in accordance with Section 35 of the *Employment Act*, 2007 (the Act). There was no work during public holidays and at the time the employment lapsed he had taken all his leave days. Termination of employment was done wholly as required under the employment contract and the law. Severance pay cannot be issued as this was the termination of employment.
5. The learned magistrate delivered judgment on 20 September 2023 and held that there was an unfair termination of employment and awarded the following;
- a. Notice pay Ksh.17,966;
 - b. House allowance Ksh.61,560;
 - c. 6 months compensation Ksh.187, 322.
6. Aggrieved by the judgment, the appellant filed this appeal on the following grounds;



1. The learned magistrate erred in law and fact in finding that the respondent was entitled to reliefs sought yet the respondent had failed to discharge the burden of proof to set that standard.
 2. The learned magistrate erred in law and fact in finding that the respondent was entitled to reliefs of house allowance despite the evidence laid by the respondent that the pay was gross pay inclusive of the house allowance as per the relevant Minimum Wage Orders of the respective years of service.
 3. The learned 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 six (6) months for unfair termination whereas the claimant had only worked for a short period of time.
 4. The learned magistrate erred in law and fact when she awarded a full month's notice of termination where the claimant had admitted to having received the letter and was paid for the months he worked under the notice period.
 5. The learned magistrate erred in law and fact when she made a finding that the claimant received the letter of termination on 15 October 2018 rather than the 1st October 2018 when the letter was dated without having any evidence to rebut the date on the letter or a corroborative witness.
 6. The learned magistrate erred in law and fact when she awarded the interest on damages for unfair termination from the date of filing the suit against the well-known principle that interest on general damages runs from the date of judgment.
 7. The learned magistrate erred in law and fact when he failed to consider the appellant arguments, submissions and authorities when arriving at his decision.
7. Parties attended and addressed the appeal by way of written submissions.
 8. The appellant in their written submissions stated that the Appellant was paid a consolidated pay even though this might not have been reflected in his pay slip.
 9. They relied on the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR where the Court relied on the case of *Banking, Insurance & Finance Union (Kenya) v Maisha Bora Sacco Society Ltd* [2018] eKLR the court held that;

“gross salary” in section 49 of the Act means the gross monthly salary per the contract of service and the 15% of basic pay house allowance as awarded will be reckoned as part of the grievants’ gross monthly salary as at the time of termination because the Court found that it was part of their due regular payment under their respective minimum terms and conditions of service.
 10. The circumstances leading to loss of work was that the appellant lost the tender with a third party which meant that there was no more work for the claimant which was a valid reason for termination. In the case of *Jared Mangera & 11 Others Vs Professional Clean Care Limited* [2018] eKLR where the court held that;

... It is apparent that the contract was therefore contingent upon the Respondent’s own contract with East African Breweries Limited Nairobi. 20. The Respondents have demonstrated that their contract with East African Breweries Limited ended on 31.8.2014 as per their Appendix N. It therefore follows that the employment contract between Claimant and Respondent also had to cease without any wrongdoing by the Respondent.



11. In the case of *Eric Odhiambo Owade & 2 others v Professional Cleaning Care Limited* [2018] eKLR held that;

As submitted for the respondent the Court follows *Enforce Security Group –Versus- Mwelase Fikile & 4 Others* DA24/15 for the opinion 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.
12. In the exercise of discretionary powers in awarding six months' compensation, the court failed to consider that the respondent has worked with the appellant for only 2 years and 4 months and also confirmed that he already has secured employment in another security firm. Courts must not only look at the outcome of the suit but also the circumstances of each case as held in the case of *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR that;
13. The Court takes the view that awarding costs is a matter of the discretion of the Court. It is not a matter of course. The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that "Cost follow the event" was driven by the fact that there could be no "one-size-fits-all" situation on the matter.
14. The Respondent was issued with a termination letter dated 1st October 2018, on 15th October 2018. The letter stated that it was a notice to him, as stipulated in the contract between the parties. However, during the hearing, the Appellant's witness confirmed that there was no written contract between the parties.
15. The appellant submitted that, on the alleged unpaid leave, in the absence of any evidence to the contrary, the prayer for leave pay is merited.
16. On whether the claim is time-barred under section 90 of the *Employment Act*, the appellant submitted that the claims should have been filed within three years of the termination of employment.
17. The respondent submitted that termination was on account of redundancy, and the appellant did not show proof of having paid severance dues to the respondent as provided for under section 40 of the *Employment Act*.
18. The appellant did not follow the procedure in terminating the Claimant's employment, considering that the notice was short, the reason given in the termination letter issued was about a non-existing contract, and the Respondent's terminal dues were not paid.

Determination

19. This is a first appeal. This court must reconsider the evidence, evaluate it, and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
20. The letter terminating employment is dated 1st October 2018. It does not state the reason for termination of employment. Section 45(2)(a) of the Act requires that the reasons for termination of employment be given to the employee. It is not sufficient that the contract of employment is provided for termination of employment upon notice. The legal threshold upon which employment should be terminated has changed and requires the employer to give the reasons leading to termination of employment.



21. In the case of *Joseph Mwaniki Nganga v United Millers Limited* [2022] eKLR the court held that;

Sections 43, 45(2), and 47(5) of the *Employment Act*, 2007, places the burden of prove of the reasons for termination on the employer. Section 43 provides that where an employer fails to prove reasons for termination, the termination shall be deemed unfair. Bare denials and putting the employee to strict proof as is always the case in other civil cases does not stand for employment claims.
22. In the case of *Wanyera v Central Isiolo Investment Limited (Appeal E002 of 2023)* [2024] KEELRC 596 (KLR) (8 March 2024) (Judgment), the court analysed the implications of Section 43 of the Act with regard to the requirements that the employer must give reasons leading to termination of employment. The court held that in a claim for unfair termination of employment, the employer should be required 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.
23. The Court of Appeal in the case of *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR held that;

... there can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); and prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.
24. In this case, the termination notice issued to the respondent was not sufficient. The appellant already knew the reasons leading to termination of employment. This is noted as being the termination of tender and contract with the third party. Hence this was the core reason leading to the issuance of termination notice to the respondent.
25. On the record, during cross-examination, the appellant's first witness testified that employment was terminated as the appellant lost a contract with KRA. This was the reason.
26. Further, the termination letter provides a month's notice period as it was signed by the respondent on 1st October 2018 with effect from 1st November 2018. Respondent's witness admitted during cross-examination that he signed the letter but did not indicate the date.
27. For lapse in adhering to the provisions of Section 43 of the Act or Sections 41 and 44 thereof, employment is terminated unfairly. The finding by the learned magistrate in this regard cannot be faulted save, notice issued and is admitted.
28. In assessing the damages payable, the learned magistrate took into account the time served. The allocation of the compensation is discretionary, however, the trial court must justify the allocation of the compensation allowed. This is to secure the market and to reserve the maximum award to cases of gross breach of fairness and due process. This position is reiterated by the court and the Court of Appeal. In *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court pointed out that an award of a 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. See *Gas Kenya Limited v Odhiambo (Appeal E006 of 2022)* [2022] KEELRC 3930 (KLR) (22 September 2022) (Judgment); *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR.



29. The learned magistrate in the judgment made a finding that the respondent had worked for two (2) years. Compensation for two months' gross salary for a full month's gross wage for each year is an appropriate compensation. This formula is applied to each file in the consolidation as outlined below.

In this case, the respondent had a gross wage of Ksh.19, 966 x 2 = Ksh.35, 932. He is awarded compensation of Ksh. Ksh.35, 932.

In ELRCA E018 of 2023, the respondent worked for two (2) years. Compensation is Ksh.17, 966 x 2 + 35,932.

In ELRCA E020 of 2023, the respondent worked for 4 years. The total due in compensation is Ksh.19, 127 x 4 = 76,508.

In ELRCA E021 of 2023, the respondent worked for 7 years. Compensation is Ksh.19, 900 x 7 = 137,200.

In ELRCA No. E022 of 2023 the respondent worked for 2 years. Compensation is Ksh.17, 160 x 2 = 34,320.

30. On the award of interests to the awards in the case of Elizaphen Mokaya Bogonko v Fredrick Omondi Ouna [2022] eKLR, the court held that the interest on general damages accrues from the date of judgment in the lower court until payment in full while interest on special damages accrues from the date of filing suit in the lower court until payment in full. In this case, the lower court held that interest should accrue from the date of filing the suit until paid in full. However, in employment claims, the award of costs is discretionary. Reasons for awarding costs must be given. Costs do not follow the cause as in commercial disputes. The allocation of costs and interests in this case was without any stated reasons. This does not accrue in this case.
31. On the claim for house allowances, in the case of Vipingo Ridge Limited v Swalehe Ngonge Mpitta [2022] eKLR the court held that whilst house allowance is ordinarily expected to be in what is described as consolidated salary, this does not necessarily, in law and fact, mean that it is automatically included. A party may provide evidence to demonstrate that this allowance did not form part of the gross consolidated pay. Such evidence may be by way of entries in a pay slip showing that the element of house allowance is omitted from the items comprising the gross pay he receives. In this case, the pay slips provided by the respondent do not indicate the house allowance.
32. The respondent was earning a gross wage of Ksh.17,966 per month. He was working within all other areas under the Regulation of Wages (General) (Amendment) Orders. In the year 2018, the basic wage was Ksh.7,240.95. even in a case where the wage due in the city was to be applied this year, the basic was Ksh.13,572.90. A 15% house allowance benefit is Ksh.1, 086.14 and Ksh.2, 035.90 respectively. The gross wage paid was above the minimum wage.
33. A similar analysis of Regulation of Wages (General) (Amendment) Orders for the years 2015, 2017 and 2018 demonstrates the appellant paid above the basic minimum.
34. The claim for house allowance is not justified.
35. Accordingly, the above analysis taken into account, the appeal is partially with merit to the extent that the award of house allowance is not justified. The judgment in Kaloleni CMELRC E010 of 2021 and consolidated judgments in the appeals are reviewed in the following terms;

ELRCA No.018 of 2023 is reviewed with the following award;

- a. Notice pay Ksh.17,966;



b. Compensation Ksh. Ksh.35, 932.

ELRCA E019 of 2023

a. Notice pay Ksh.17,966;

b. Compensation Ksh. 35,932.

ELRCA E020 of 2023,

a. Notice pay Ksh.19,127;

b. Compensation Ksh. 76,508.

ELRCA E021 of 2023,

a. Notice pay Ksh.19,900;

b. Compensation Ksh. 137,200.

ELRCA No. E022 of 2023;

a. Notice pay Ksh.17,160;

b. Compensation Ksh. 34,320.

Each party is to bear its costs of the appeal and lower court.

DELIVERED IN OPEN COURT AT MALINDI THIS 26TH DAY OF APRIL 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Nasra

..... and

