



**Thoya v Delfy Security Limited (Appeal E125 of 2023)
[2024] KEELRC 949 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 949 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E125 OF 2023**

**M MBARÚ, J
APRIL 18, 2024**

BETWEEN

ALBERT IHA THOYA APPELLANT

AND

DELFIY SECURITY LIMITED RESPONDENT

*(Being an appeal against the judgment of Hon. D.O. Mbeja
delivered on 28 July 2023 in Mombasa CMELRC No. E085 of 2023)*

JUDGMENT

1. The appeal herein arises from the judgment in Mombasa CMELRC No. E085 of 2023.
2. The appellant filed his claim before the trial court on the basis that he was employed by the respondent as a night security guard on 8 July 2018 at a wage of Ksh.7, 000 per month. The wage was paid through SBM Bank Kenya Limited. He worked until 12 May 2020 when his employment was terminated. Employment was through verbal contract and registered with NSSF. He claimed that he was underpaid and not allocated a house allowance. He was deducted Ksh.900 monthly without a proper explanation. He claimed the following;
 1. One month notice pay Ksh.17,413.20;
 2. Salary from 1st to 12 May 2020 Ksh.8,718.60;
 3. Amount deducted for 21 months Ksh.18,900;
 4. Underpayments Ksh.170,980;
 5. Arrears in house allowance for 21 months Ksh.47,697.10;
 6. Overtime of 2 hours for 22 months Ksh.216,295.20;



7. Maximum compensation Ksh.181,703.40;
 8. Certificate of service;
 9. Costs.
3. In response, the respondent made mere denials and denied ever employing the appellant as alleged. Employment was terminated because the client whose premises the appellant was guarding terminated the contract hence there was no work. The appellant was aware of the circumstances under which his employment was terminated and cannot justify a claim of unfair termination of employment.
 4. On 28 July 2023, the trial court delivered judgment. It held that the process leading to the termination of employment was fair and there was no prima facie case established against the respondent. The reliefs sought were not justified and hence dismissed the suit in its entirety.
 5. Aggrieved by the judgment, the appellant filed this appeal.
 6. The appeal is that the trial court failed to make findings on the appellant's case with regard to;
 1. Claim for days worked from 1st to 12 May 2020;
 2. The amount deducted from the salary of the appellant at Ksh.900 for 21 months;
 3. Underpayments based on the basic wage from 1st August 2018 to 30 April 2020;
 4. The arrears on house allowance effective from 1st August 2018 to 20 April 2020;
 5. Overtime worked but not paid;
 6. Issuance of Certificate of Service.
 7. The appellant also raised the grounds that the trial court failed to decide on each remedy sought with regard to days worked, deductions effected without explanation, underpayment of his wages, non-payment of house allowance, overtime and issuance of a Certificate of Service. The finding that the appellant absconded duty on 12 May 2020 was without evidence and had not been pleaded. That the appellant began working with M/S Seun Real Estate Company Ltd was without evidence and this could not justify the finding that he absconded duty. The entire record and submissions were not considered leading to an erroneous judgment. The appellant is seeking that the judgment of the trial court be set aside and his claims be awarded as pleaded.
 8. Both parties attended and agreed to address this by way of written submissions.
 9. The appellant submitted that the pleadings, evidence and findings of the trial court were at variance. The finding that the employment of the appellant terminated after he absconded duty was not pleaded or supported by any evidence to justify the finding that there was no prima facie case to justify a claim of unfair termination of employment. The appellant was called in evidence and testified to the nature of his work and how his employment was terminated without notice. The respondent conformed notice from its client Seun Estate on 12 May 2020 that it would terminate its contract to the respondent. There was no notice from the appellant about these changes.
 10. The appellant had a wage deduction of Ksh.900 per month without any explanation. At the end of his employment, this was due to him. The bank statements submitted confirm that the appellant was earning a wage of Ksh.7, 000 per month paid through his bank account by the respondent. Such was an underpayment for a night guard working in Mombasa. Where the respondent alleged desertion of



duty, such was not addressed as required as held in *Boniface Francis Mwangi v BOM Iyego Secondary School* [2019] eKLR.

11. Without the due process, the appellant is entitled to notice pay and compensation. These should have been assessed by the trial court together with the reliefs sought in underpayments, house allowance and overtime. Issuance of a Certificate of Service at the end of employment is a legal requirement. The appeal should be allowed with costs.
12. The respondent submitted that the judgment of the trial court was based on the evidence presented and should be confirmed. The court established that the appellant had failed to make a prima facie case and had not proved a case of unfair termination of employment as he absconded duty. In ELRCA No. E001 of 2021 *Milano Electronic v Dickson Nyasi (Malindi)* the court held that Sections 43, 45 and 47 of the *Employment Act* shifts the burden of proving whether there was unfair termination of employment on the employer. In this case, the respondent demonstrated to the court through pleadings and its witness that its client Seun Real Estate Company Limited where the appellant was assigned to guard terminated the contract. It was incumbent upon the appellant to report to the office for redeployment.
13. He failed to do so and when the respondent went to check, they found him working for the former client with a different uniform.
14. The appellant did not deny such a matter. He immediately started working for Seun Estate. Section 44 (4) of the Act allows summary dismissal where an employee has absconded duty as held in *Kenya Airports Authority v Kingstone (Kenya) Limited* [2009] EA. These were relevant facts put into account by the trial court in assessing the claims and correctly dismissed the suit and the appeal should be dismissed with costs.

Determination

15. This is a first appeal. The course is required to re-evaluate, re-assess and arrive at conclusions. However, take into account that the trial court had the opportunity to hear the parties in evidence.
16. The issues which emerge for determination are;
 1. Whether there were proper findings with regard to the issue of unfair termination of employment;
 2. Whether the appeal is with merit; Whether costs should be awarded.
17. Before the trial court, the appellant testified that he reported to work on 12 May 2022 [2020] and was told to surrender his uniforms and to leave. He was cross-examined on his evidence and testified that he used to guard success building and knew of Seun Real Estate. He was not aware of any contract, he was only called and told that there were no guards.
18. He continued working and wore his home clothes as a guard. He was later told the company had no contract. The respondent did not issue him with a notice or letter terminating his employment.
19. The respondent called Ibrahim Hamid the operations manager, Mombasa. He testified that the appellant was an employee. He was not dismissed but the landlord terminated the services and the appellant failed to report to the office for reassignment. After one week, he took the initiative to go look for him when he discovered that he was employed as a private security guard by Seun Estate.
20. The respondent hence confirmed the appellant was an employee. In response, the respondent also confirmed that the client, Seun Real Estate terminated its contract with the respondent and the appellant had no work. That he failed to report back to the office to be reassigned work.



21. Section 13 of the *Employment Act*, 2007 (the Act) places the legal duty upon the employer to issue employment changes to the employee in writing. Where the respondent received a written notice from its client that they were terminating the contract where the appellant was guarding, such required the respondent to issue notice upon the appellant to report to the office for reassignment of duty.
22. The motions of Section 44(4) (a) of the Act must be addressed by the employer. Where the employee fails to attend work is required, the employer must issue notice to the employee in terms of Section 41(2) of the Act. To allege that the appellant was at large and for a week the respondent did not know his whereabouts is a failure on the part of the respondent to render an account of the legal duty under Sections 44 and 41 of the Act. The employee cannot terminate his employment without the sanction of the employer, notice must be issued as held in *Paul Mwakio v Reliable Freight Services Ltd* [2022] eKLR.
23. This position is reiterated in the case of *Richard Kiplimo Koech v Yuko Supermarket Ltd* [2015] eKLR that absconding duty is an act of misconduct on the part of the employee. Upon such misconduct, the requirements of Section 41 of the Act are obtained. The court held that;
24. Absence from work without permission or lawful cause is one of the grounds upon which an employer may summarily dismiss an employee. Absence without permission falls under misconduct and pursuant to Section 41 of the *Employment Act*, 2007, a hearing is necessary.
25. And in my view, it is incumbent upon an employer who alleges that an employee has absconded to make reasonable attempts or efforts to reach the employee and seek any explanation to excuse itself from the application of Section 41 of the *Employment Act*, 2007. A prudent employer such as the Respondent will invariably keep contact details of its employees.
26. In the case of *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR the court held that;

It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.

...

An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.
27. This position is emphasized in the case of *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR that;

Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.
28. In this case, the only matter taken by the respondent as the employer was to go back to the site being guarded by the appellant where he was found undertaking similar duties as previously held with the respondent. Nothing was done to bring him to account with regard to his employment. No notice was issued to him to show cause why his employment should not be terminated due to abandonment of his employment. He was left at large.
29. On this basis, the respondent failed in its legal duty. Whatever course of action the appellant took to secure new employment, the respondent should and ought to have addressed the termination of



employment through due process. The motions of Sections 41 and 44 of the Act were not adhered to. This resulted in unfair termination of employment.

30. Notice pay and compensation should have been assessed by the trial court. In this regard, the same shall be assessed as due.
31. The appellant is seeking various remedies. Whatever reason led to termination of employment, the trial court should have addressed each claim on the merit as required under Section 18(4) of the Act. Even in a case of summary dismissal, the employee should not be denied his legal entitlements accrued with his employment.
32. The evidence that the appellant was a night security guard is not challenged. He filed his bank statements and demonstrated that he was paid different wages each month. The statement has the following sample records;

July 2018, a payment of Ksh.4,168;

November 2018, a payment of Ksh.4, 353;

January 2019, a payment of Ksh.5, 100;

February 2019, a payment of Ksh.4, 000;

11 May 2020, a payment of Ksh.6, 000;

6 April 2020, a payment of Ksh.6, 000;

11 March 2020, a payment of Ksh.5, 400.

These payments have no consistent order but are paid after every month's end.

33. The appellant's evidence was that he was paid a wage of Ksh.7, 000 out of which the respondent made a deduction of Ksh.9, 000 monthly.
34. Based on the wage of Ksh.7, 000 per month, under the Wage Orders applicable by July 2018, a night security guard's minimum wage was Ksh. 15,141.95. There was an underpayment of Ksh.8, 141.95. The Wage Orders did not change for the period worked. For 21 months, the underpayment of wages is Ksh.170, 980.95.
35. On the minimum wage of Ksh.15, 141.95, a house allowance of 15% thereof is due for the 21 months worked. The sum of Ksh.2, 271.20 x 21 is due at Ksh.47, 697.15.
The total gross wage due was Ksh.17, 413.15 per month.
This is due in notice pay all at ksh.17, 413.15.
36. On the claim for salary for days worked in May 2020, these were lawfully earned and should be paid. From the gross wage of Ksh.17, 314.15 a sum of Ksh. 6,972 is due.
37. On the claim for overtime worked for 2 hours per day for 22 months, under the Regulation of Wages (Protective Security Services) (Amendment) Order, a night security guard is allowed to work for ten hours a day spread over a week with a rest day. The appellant made a general claim without indicating how many hours he worked in total to address the claim for 2 overtime hours of work. His starting hour or his exit hour is not included in his pleading, evidence or written submissions. On the general claims, assessment of what is due cannot be discerned.
38. The claim that there were deductions of Ksh, 900 per month was not given much weight by the respondent. As outlined above, the wages paid to the appellant are staggered and not explained.



Alienation of an employee wage must be for given reasons and should abide by the provisions of Sections 17, 18 and 20 of the Act. Ultimately, the employee is entitled to a payment statement under Section 20 of the Act with an outline of all the payments and deductions effected. To proceed and effect a wage deduction without due course is an employment violation.

39. The claim for Ksh.900 for 21 months is justified.
40. With regard to compensation, the appellant does not deny that immediately after his employment with the appellant ceased he secured new employment with the same client where he was guarding with Seun Estate. Save for the unfair termination of his employment, he was not left idle. He did not report that he had secured new employment and to regularise his employment with the respondent. Compensation for one month's gross wage is hereby found appropriate all at Ksh.17, 413.15.
41. A Certificate of Service for the period worked is a legal requirement under Section 51 of the Act. Upon clearance, this should be issued.
42. On the claim for costs, the appeal is successful on several grounds, the appellant is awarded 50% of costs.
43. Accordingly, the appeal is hereby allowed; judgment in Mombasa CMELRC No.E085 of 2023 is hereby set aside and the following orders are issued;
 1. Employment of the appellant was terminated unfairly by the respondent;
 2. Compensation awarded at ksh.17,313.15;
 3. Notice pay Ksh.17,413.15;
 4. Salary 12 days worked in May 2020 Ksh.6,972;
 5. Amount deducted for 21 months Ksh.18,900;
 6. Underpayments Ksh.170,980.95;
 7. House allowance Ksh.47,695.15;
 8. Certificate of service;
 9. 50% costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18 DAY OF APRIL 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

