



**Tick Security Services Limited v Kiseli (Appeal E003 of 2024)
[2024] KEELRC 1563 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1563 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E003 OF 2024**

**M MBARŪ, J
JUNE 13, 2024**

BETWEEN

TICK SECURITY SERVICES LIMITED APPELLANT

AND

JOSEPH KISELI RESPONDENT

*(Being an appeal from the judgment of Hon. R. N. Akee in
Mombasa CMELRC No.E361 of 2021 delivered on 6 December 2023)*

JUDGMENT

1. The appeal herein arises from the judgment delivered on 6 December 2023 in Mombasa CMELRC No E361 of 2021. Aggrieved, the appellant is seeking that there be a finding that the respondent's employment ended by effluxion of time and hence the judgment awarding him Kshs 200,000 in general damages be set aside and the claims be dismissed with costs.
2. The respondent was the claimant before the trial court and his case was that in January 2019 he was employed by the appellant as a night guard and stationed at KPA Kilindini harbour. His wage was Kshs 8, 000 per month which was an underpayment since he was entitled to the minimum wage of Kshs 12, 926.55 plus a house allowance of 15% total being Kshs 14, 865.50 per month. He claimed that he was not issued with a written contract and he worked continuously until 14 April 2020 when his employment was verbally terminated by the appellant without any notice, hearing or reasons being given. He claimed the following terminal dues;
 - a. One month notice pay Kshs 14,865.50;
 - b. Service pay Kshs 6,463;
 - c. Salary underpayments Kshs 6,865 x 16 Kshs 109,840;
 - d. Unpaid off days 4 days x 16 months Kshs 31,813;



- e. Uniform and port pass deduction Kshs 17,500;
 - f. Damages for unfair termination of employment for 12 months Kshs 155,118.60;
 - g. Costs of the suit.
3. In response, the appellant admitted that the respondent was an employee but there were no underpayments as alleged. His wages were paid under the prevailing wage regulation Orders. The respondent was employed on a casual basis from time to time, on intermittent occasions and subject to availability of work. The parties executed employment agreements which regulated the employment of the respondent. The contractual terms of employment had terms and conditions of service. There was no termination of employment as alleged, the contract of employment lapsed. His employment was marred by multiple disciplinary infractions and warnings for being rude, unruly and absconding from duty. A fixed-term contract ended on its terms and hence no need for notice or reasons leading to termination. The claims made are not justified and should be dismissed.
 4. In the judgment of the trial court, there was a finding that the respondent was unfairly terminated and a general award of Kshs 200, 000 noted as general damages plus costs.
 5. Aggrieved, the appellant filed this appeal on the grounds that the trial court failed to make a determination on the issues pleaded and hence inferred facts outside the evidence. The finding that there was unfair termination of employment had no basis and was in error and the question of fixed term contract was not addressed or a determination made. The fact that the employment contract lapsed on its terms should be reviewed and the judgment set aside with costs.
 6. Parties attended court on 12 April 2024 and agreed to address the appeal by way of written submissions. On 14 May 2024, only the appellant had complied. The respondent was given until 22 May 2024 to file submissions but there is no compliance.
 7. The appellant submitted that the trial court ignored the evidence placed before the court, this resulted in erroneous findings that employment was terminated unfairly. The respondent claimed that he had worked continuously from January 2014 to 14 April 2020 and the appellant submitted evidence of employment on a term contract. The contract dated 15 January 2020 expired on 13 April 2020. It lapsed on its terms and hence no requirement to issue notice or reasons for termination.
 8. The respondent testified that an NHIF assessment showing the time he was employed by the appellant related to another company, Urbantech Security an indication that he never worked for the appellant continuously from January 2019 to April 2020. The respondent admitted to the facts set out in the NHIF statement. This then became a material fact in this case for determination that the term contract expired and notice pay and general damages assessed should be set aside.
 9. The appellant submitted that in the case of *Stanley Kiptanui Bii v Catholic Diocese of Nakuru* [2020] eKLR the court held that the employee was bound under the term contract. It had a start and end date.
 10. In this case, the respondent testified that he was constructively dismissed and contradicted his pleadings. In the case of *Lear Shighadi Sinova v Avetech Systems Limited* [2017] eKLR, the court held that the ingredients of constructive dismissal relate to where an employee has resigned from his employment due to the employer placing him under intolerable working conditions which is not plodded in this case.
 11. Parties were under a written contract which lapsed. It did not require notice or reasons to be given to the respondent at the end of his employment. The general damages awarded at Kshs 200, 000 had no



legal or factual basis as required under Section 49 of the [Employment Act](#). No reasons were given for this general award and the appeal should be allowed with costs.

As noted above, the respondent did not file any written submissions.

Determination

12. This is a first appeal. The court is mandated to review the entire record, re-assess the same and make its conclusions.
Employment between the parties is admitted.
13. What is not agreed is that the respondent pleaded that he was employed on oral terms while the appellant asserted that there was a term contract dated 15 January 2020 that expired on 13 April 2020.
14. Part of the records filed to support the appellant's case before the trial court were employment contracts. The contract dated 17 January 2019 covered the period of 10 January to 10 April 2019. The respondent signed and also placed a thumbprint. This signature and the one placed in the Verifying Affidavit dated 2 June 2021 in support of the claim bear similarity.
15. Another contract was issued dated 12 July 2019. A certificate of contract completion issued on 9 October 2019. A third contract dated 15 January 2020 was issued and a certificate of completion dated 13 April 2020.
16. These contracts were not challenged during the hearing. Save, the respondent testified that he worked for the appellant continuously for 16 months but put to task during cross-examination he admitted that his employment was on a three-month contract and would be renewed periodically. He signed each contract but did not fully understand the contract. His employment was terminated on 17 April 2020 and before June 2019, he was working for a different employer.
17. This then became material facts for the trial court to address in the judgment.
18. The appellant discharged its legal duty and produced work records to the effect that the respondent was under a fixed-term contract. Each had a start and end date.
19. Under Section 10(3) of the [Employment Act](#), 2007 a term contract is lawful and valid. It has a start and end date. No notice or reason for termination is necessary. Such a contract terminates on its terms. See [Transparency International – Kenya v Teresa Carlo Omondi](#) [2019] eKLR.
20. In this case, the finding that there was a verbal contract and verbal termination of employment is in error given the response admitting to the fact that he was regulated under a term contract.
21. Notice pay and compensation are awarded in error and hence not justified.
22. On the claims for service pay, under the provisions of Section 35(5) and (6) of the Act, service pay is only due where the employer fails to remit statutory dues for the employee and or fails to place the employee under a pension scheme. Where service pay accrues, the basis is that the employee has served for over a full year. Service pay is not prorated.
23. As outlined above, the claimant had three distinct term contracts. Each ending on its terms. He did not serve for over a year in any of the contracts to claim service pay which he prorated.
24. On the claim for underpayments for 16 months, in the contract dated 15 January 2020, clause (7) provided for a wage of Kshs 8, 000 per month. The work site is noted under the preamble as Port of Mombasa. The wage due to a security guard in Mombasa in the year 2020 is 14,865.50 inclusive of the due house allowance under the Wage Orders.



25. Under the 3 contracts, the wages were similar. An application of Section 90 of the *Employment Act*, 2007 allows the respondent to go back to each contract and claim underpayments. For the total 9 months worked under each contract, there was an underpayment of Kshs 6, 865 all being Kshs 61, 785 due in underpayments.
26. On the unpaid off days, there are no work records filed to support how the respondent took his off days or received compensation per Section 27 of the *Employment Act*, 2007. The diligence in filing the term contract is not gone into in filing records for off days. The respondent was well entitled to claim 4 rest days due each month but such should be tabulated using the basic wage of Kshs 12, 926.55.
27. For the 9 months served, a total of 36 off days accrue. Each day based on the basic wage of Kshs 12, 926.55 amounts to Kshs 430 x 36 days, the total due is Kshs 15, 511.20 in rest day pay.
28. On the claim for uniform deductions, the employer has the legal duty to provide the employee with a work tool. For the respondent, the uniform supplied was for the sole purpose of his work duties with the appellant.
29. Under clause (3.2) of the contract, a sum of Kshs 50, 000 was deducted per month to secure uniform items and other equipment issued to the employee, non-refundable, for logistics and administrative purposes only.
30. The respondent claimed the sum of Kshs 500 per month. Based on his contract terms, the deduction of Kshs 50 per month to secure work tools, upon return of such tools, this amount should be refunded to the employee. A sum of Kshs 450 is due to the respondent upon clearance with the appellant.
31. On the awarded costs, in an employment claim, costs do not follow the cause. Reasons for award of costs are imperative. None were given in this case. Each party bears its costs.
32. Accordingly, the appeal is found with merit and the judgment is Mombasa CMELRC No E361 of 2021 is hereby reviewed in the following terms;
 - a. Employment terminated lawfully under the term contracts;
 - b. Underpayments awarded at Kshs 61,785;
 - c. Rest days 15,511.20;
 - d. Uniform deductions of Kshs 450 upon the respondent undertaking clearance;
 - e. Each party bears the costs of the lower court and this appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF JUNE 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

