Riley Falcon Security Limited v Simiyu (Appeal E011 of 2024) [2024] KEELRC 2710 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2710 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

APPEAL E011 OF 2024

M MBARŨ, J

OCTOBER 31, 2024

BETWEEN

RILEY FALCON SECURITY LIMITED .... APPELLANT

AND

KEVIN SIMIYU .... RESPONDENT

(Being an appeal from the judgment of Hon. J. Ongundo delivered on 20 March 2024 in Malindi MCELRC E015 of 2022)

JUDGMENT

1. The appeal arises from the judgment delivered on 20 March 2024 in Malindi MCELRC E015 of 2022. The appellant seeks to set the judgment aside and dismiss the claim with costs.
2. The background to this appeal is a claim filed by the respondent before the trial court. His case was that in August 2019, the appellant employed him as a security guard on a one-year contract at a wage of Ksh.12, 522 per month. He was deployed to various workstations in Malindi by the respondent until when his contract was about to end in August 2020. There was no communication about renewal, and he continued his employment uninterrupted for a year and two months.
3. On 28 October 2021, while the respondent was on his off, he received a call from his supervisor to report to the Mombasa office and hand over his duties and property to the appellant. His employment was then terminated with immediate effect. There was no notice, hearing or payment of terminal dues as required under Sections 35 and 41 of the *Employment Act*. He was not paid for annual leave or issued with a certificate of service. He claimed the following;
    a. 12 months compensation for unfair termination of employment Ksh.156,000;
    b. Unpaid leave for 2 years Ksh.26,000;
    c. Unpaid off days for 3 months Ksh.5,784;

d. Overtime of 3 hours each day for 26 months Ksh.162,786;

e. Uniform refund Ksh.6,000;

f. Notice pay Ksh.13,000;

g. Certificate of service;

h. Costs of the suit.

4. In response, the appellant's case was that on 6 August 2019, they offered the respondent a one-year contract as a security guard ending on 7 August 2020. On 28 October 2020, it offered the respondent another contract ending on 27 October 2020. Through a letter dated 28 October 2021, the appellant informed the respondent that his contract had ended and advised him to apply by the close of 29 October 2021 if interested in the position. On 30 October 2021, the respondent wrote a letter to the human resources manager indicating that he would apply for another employment at a later date. In the circumstances, there was no duty to issue a notice at the end of the contract term. The respondent applied and was given 26 leave days from 30 October 2021 to 24 November 2021 and the other leave days were paid to the claimant together with his November 2021 salary. All off days were taken when due. Overtime worked was paid together with the monthly wage and uniform refund and the claims made should be dismissed with costs.

5. The learned magistrate heard the parties and in the judgment held there was unfair termination of employment and the following awards were justified;

a. Notice pay Ksh.13,000;

b. 12 months compensation Ksh.156,000;

c. Unpaid leave for two years Ksh.26,000;

d. Uniform refund Ksh.6,000;

e. Certificate of service;

f. Costs of the suit.

6. Aggrieved by the judgment, the appellant filed this appeal on nine (9) grounds. The appeal is that the learned magistrate erred in finding that the respondent was entitled to one month's notice whereas he was under a fixed term contract. The contract ended on its terms and hence no case of unfair termination of employment requiring notice or payment of compensation. The award of leave pay for two years was without merit and not justified as there is evidence submitted of the respondent taking leave. The award of 12 months compensation was excessive without reasons or justification and the same should have statutory deductions.

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

8. The appellant submitted that the appellant was employed under fixed-term contracts which had a start and end date and did not require notice or reasons for termination. The findings that there was unfair termination of employment and hence award of notice and compensation were in error and should be set aside. In the case of Johnstone Luvusia v All Pack Industries Limited [2019] eKLR the court held that where a contract ends as agreed by the parties, there is no legal duty to issue notice or reasons.

9. In the case of Ibrahim Ulalo v Nation Media Group [2024] eKLR the court held that where leave is not specifically pleaded to allow the other party to respond, such a claim should be dismissed.

10. In this case, the award of 12 months was excessive and without justification. In the case of CMC Aviation Limited v Mohamed Noor [2015] eKLR the court held that the maximum award should be based on exceptional reasons and justification.

11. The awards of the court should be subject to statutory deductions as held in *John Njoroge Wanjilu v Aldonai Enterprises Limited Cause No. 26 of 2020* (Mombasa). The appeal should be allowed with costs.

12. The respondent submitted that during the entire period of his employment with the appellant, he was not notified that he should apply for the renewal of his contract. He continued working without a contract until he was summoned to Mombasa to hand over his uniform. The trial court well analyzed the evidence and arrived at a just decision which should be confirmed.

13. The respondent submitted that he was entitled to notice pay and compensation following unfair termination of employment. In the case of Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR the court held that contracts of service have a mutuality of rights and obligations for both parties and either is allowed to terminate by giving reasonable notice. Where then employment is terminated without due process, this amounts to unfair termination of employment and the award of 12 months is justified as held in the case of Robi Stephen Nyamohanga v Judicial Service Commission [2017] eKLR.

14. For 2 years, the respondent was not allowed to take his annual leave, the award was justified together with the uniform refund and the appeal should be dismissed with costs.

Determination

15. This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the trial court. An appeal to this Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, 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 allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V. Brown [1970] E.A.L.

16. In reply to the claim, the appellant filed work records required under Section 10(6) and (7) of the *Employment Act*. These included a contract dated 6 August 2019 ending 7 August 2020. The respondent signed the contract on 6 August 2019.

17. A contract dated 28 October 2020 ending 27 October 2021. The respondent signed on 28 October 2020.

18. A letter dated 28 October 2021 was sent to the respondent at P.O. Box 56152, Nairobi.

19. Whereas the two contracts were received by the respondent, the letter dated 28 October 2021 is not acknowledged. The postal address is to the appellant's Nairobi office.

20. The respondent's case is that he was placed at various sites within Malindi. His postal address is 553 Kitale.

21. The letter dated 28 October 2021 informed the respondent that his contract was ending on 28 October 2021 and he was required to apply for the position by 29 October 2021.

22. The appellant also submitted a letter dated 30 October 2021 stated to be from the respondent indicating that his contract was ending on 30 October 2021 and he was requesting to re-apply latter.

23. The court reading of this letter dated 30 October 2021 is that the respondent was not well-versed in the English language. This is not a crime. This is what is envisaged under the provisions of Section 9(4) of the *Employment Act*;

    (4) Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that the employee understands.

24. The duty is upon the employer to explain the contents of the contract to the employee in a language he understands. This obligation was not discharged in this case.

25. The letter requiring the respondent to re-apply for the renewal of his contract was sent to the appellant's postal address and hence did not reach the respondent at all. There is no proof of such service. The additional lapse in explaining to the respondent the contents and requirements of the letter dated 28 October 2021 further exacerbated his failure to make a proper application for the job he had held without any poor work record.

26. The respondent did what he honestly thought was an application for the job. In his evidence-in-chief, the respondent noted this much.

27. Whereas under a fixed-term contract, each party is allowed to end the same upon notice or allow the contract to end on its terms, where the employer initiates and invites the employee to make a renewal application, there exists a legitimate expectation that an application is an expression of interests to have the contract renewed. The issuance of notice dated 28 October 2021 speaks to the need to keep the respondent in employment.

28. The lapse in issuing the respondent with a letter and notice in a language he could understand to guide him to make a proper application resulted in unfair Labour practices. The appellant should have secured the respondent's rights at work under the provisions of the law. Before termination of his employment through summary action, noting the lapses as analyzed above, notice should have been issued as held in Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu, Anthony Kibuchi Muriuki, Moses Bundi Nkanata, Jesee Waweru Kiama & Joram Gatara Macharia [2018] KECA that;

    > Other provisions of the Act relating to termination of employment should also have been complied with. It is common ground that no notice was served pursuant to section 35 above. Indeed, the appellant whose legal duty it was to keep records relating to its employees produced no records relating to termination. The termination was therefore unlawful, and we so find. We also affirm the finding by the trial court that the appellant had engaged in unfair labour practices.

29. Engaging in unfair Labour practices is prohibited under the provisions of Article 41 of *the Constitution* and actualized under the rights secured under the *Employment Act*. Termination of employment was unfair and contrary to the provisions of Sections 35, 41 and 45 of the *Employment Act*. Upon the breach of Section 9(4) of the *Employment Act*, subsequent communications to the respondent by the appellant were invalid.

    Notice pay and compensation are justified.

30. The appellant was earning a gross wage of Ksh.18, 145.56 which is due.

31. On the award of 12 months compensation, indeed, as submitted by the appellant, the award of compensation must be with reasons and justification. In the case of Postal Corporation of Kenya v

Andrew K. Tanui [2019] KECA, the court held that the court has the discretion to make an award, but it should not be whimsical. The discretion should be exercised on sound judicial principles. Reasons for the award should be stated with a justification.

32. In the case of Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR the court held that;

> The judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention.
>
> In this case, the learned magistrate has made a general award of compensation at the maximum of 12 months without giving any reasons whatsoever. An interference is justified.
>
> The respondent worked under his first contract successfully. He was due to end his 2nd contract when he sought to apply for renewal save the invitation to do so was sent to the appellant's office instead. This denied the respondent a fair chance to enjoy another contract. Upon the findings above, compensation for three months' gross wage is hereby found justified. The respondent was earning Ksh.18, 145.56 per month x 3 is Ksh.54, 436.68 in compensation.

33. On the claim for leave for two years, the work records filed include the respondent leave application form for 26 days beginning on 30 October 2021 and ending on 24 November 2021.

    From the evidence, employment was terminated on 30 October 2021.

34. The respondent cleared with the appellant through the record dated 30 October 2021.

35. There is a huge disparity in these records. This can only mean one thing, these records are manipulated to divert justice. This is a complete abuse of court process.

36. For the claimed leave, the records filed by the appellant lack authenticity. These do not require a technical eye but a bare look at the dates stated.

37. The appellant is entitled to the claim for two years of annual leave based on the last basic wage of Ksh.14, 037.98 x 2 = 28,075.96 in leave pay.

38. On the claim for off days, the appellant did not file any work records on the off days taken by the respondent. He specified and particularized his claims to include off days due for 3 months of March, May and June 2021 at Ksh.5, 784. This is modest and based on very conservative figures. This is found justified as claimed Ksh.5, 784.

39. The overtime claim was not awarded by the trial court and the respondent in the written submissions had not delved into the matter to distinguish between the claims for overtime, off days and other claims.

40. A uniform refund is due at the end of employment together with a certificate of service under the provisions of Section 51 of the *Employment Act*.

41. On costs, in employment and Labour relations claims, costs are not automatic. Costs should abide by the principles under Section 12(4) of the *Employment and Labour Relations Court Act*. The ward of costs should be for given reasons and justification.

42. In this case, the appeal partially succeed. Each party should meet its costs. However, for the trial court proceedings, costs as awarded save no interests are due.

43. Accordingly, judgment in Malindi MCELRC is set aside and substituted with the following awards;

    a. Employment terminated unfairly;

    b. Compensation Ksh.54,436.68;

    c. Notice pay 18,145.56;

    d. Leave pay 28,075.96;

    e. Uniform refund Ksh.6,000;

    f. Off days Ksh.5,784;

    g. Certificate of service be issued;

    h. Each party bears its costs for this appeal. Costs for the trial court as awarded save no interests are due.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 31ST DAY OF OCTOBER 2024.

M. MBARŨ

JUDGE