



Akhabochi v Inter Neighbourhood Security (Employment and Labour Relations Appeal E023 of 2023) [2024] KEELRC 13195 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 13195 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E023 OF 2023**

**DKN MARETE, J
OCTOBER 30, 2024**

BETWEEN

EDKAN OKEMBA AKHABOCHI APPELLANT

AND

INTER NEIGHBOURHOOD SECURITY RESPONDENT

(Being an appeal from the judgment and decree of Hon. Wendy Micheni, Chief Magistrate in Nairobi in MCELRC/e744 of 2021 delivered on the 24th february 2023)

JUDGMENT

1. The above-named Appellant being aggrieved and dissatisfied by the Judgment and Decree given on 24/2/2023 by the above-mentioned Court now appeals to the High Court Employment and Labour relations Court of Kenya at Nairobi against the entire judgment on the following grounds namely:
 1. The learned Magistrate erred both in law and fact in holding that the Respondent had proved his case as against the Appellant on a balance of probability.
 2. The learned Magistrate erred both in law and in fact in holding that the termination of the Appellant was lawful and fair.
 3. The learned Magistrate erred both in law and in fact in holding that the Respondent followed due process and had valid and fair reasons to terminate the Appellant and acted lawfully.
 4. The learned Magistrate erred in law in proceeding under the wrong principles of Employment and Labour Laws.
 5. The learned Magistrate erred in law and fact by failing to consider the Appellant worked as a night guard thus his minimum monthly pay is stipulated to be Ksh.15,141.95 exclusive of housing allowance as per the regulation of wages (General)(Amendment) Order, 2018.



6. The learned Magistrate erred both in law and fact by failing to arrive to a conclusion that the Appellant monthly salary of Ksh.8,700 was below the stipulated statutory minimum salary.
7. The learned Magistrate erred both in law and fact by failing to make an award in favour of the Appellant for the sum of Ksh.77,303.40 ostensibly on account of underpayments accrued for the 12 months worked by the Appellant for the Respondent.
8. The learned Magistrate erred both in law and fact by failing to make a gratuitous award in favour of the Appellant for the sum of Ksh.69,652.96 ostensibly on account of compensation equivalent to 4 months' salary for unfair and /or wrongful dismissal or unlawful termination.
9. The learned Magistrate erred both in law and fact by failing to make an award in favour of the Appellant for the sum of Ksh.17,413.24 ostensibly on account of one month pay in lieu of Notice for unfair and /or wrongful dismissal or unlawful termination.
10. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Ksh.12,057.40 on account of service gratuity which the Appellant was in Law entitled.
11. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Ksh. 17,413.24 on account of leave pay for the 1 year worked and Ksh.850 on account of leave travelling allowance by the Appellant which the Appellant was in Law entitled
12. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Ksh.111,444.74 on account of overtime hours worked despite the overwhelming evidence adduced by the Appellant and admission by the Respondent to the Claim that the appellant worked a 12 hours daily shift.
13. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Ksh.42,603.60 on account of unpaid public holidays worked despite the overwhelming evidence adduced by the appellant.
14. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Ksh.117,979.20 on account of unpaid rest days worked despite the overwhelming evidence adduced by the appellant.
15. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Ksh.27,255.51 on account of housing allowance which the Appellant was in Law entitled.
16. The learned Magistrate erred both in law and fact in entering Judgment for the sum of Ksh.8,700 being a one month unpaid salary arrears instead of sum of Ksh.528,799.77 in the case against the Respondent amidst overwhelming evidence that the appellant claim was strictly proven with regard to the remainder sum of Ksh.520,099.77.
17. The learned Magistrate erred both in law and fact in awarding the Claimant only the salary of April 2021 instead of salary arrears for the months of March and April 2021 despite the Respondent admitting having not paid the Claimant and was willing to pay the same.
18. The learned Magistrate erred both in law and fact in failing to award a Certificate of Service which the Appellant was in Law entitled.



19. The learned Magistrate erred in law in failing to appreciate the correct evidence adduced and tendered in Court.
 20. The learned Magistrate erred in law and fact by failing to apply the law and applying the principal of estoppel where there is direct provision of the law.
 21. The learned Magistrate misdirected herself in her analysis, evaluation, interpretation and assessment of the entire evidence tendered by the appellant and thus arriving at a wrong, erroneous and unjust conclusion and judgment.
 22. The learned Magistrate erred in law in basing her decision on extraneous factors.
 23. The entire decision is contrary to law and a misapprehension of the law.
2. REASONS WHEREFORE, the Appellant prays that this Appeal be allowed, the decision of the learned Magistrate be set aside, overturned and or reversed and this Honourable Court be pleased to substitute with an Order that the Appellants suit in the Lower Court be allowed for the prayers of;
1. The Honourable Court awards the Appellant Ksh.34,826 being unpaid salary arrears for the months of March and April 2021 in place of Ksh.8,700 awarded for unpaid salary arrears for the month of April 2021.
 2. The Honourable Court awards the Appellant Ksh.17,413.24 being one month pay in lieu of notice.
 3. The Honourable Court awards the Appellant Ksh.77,303.40 being accumulated salary underpayments as at the time of termination of employment.
 4. The Honourable Court awards the Appellant Ksh.69,652.96 being compensation equivalent to 4 months' salary for wrongful dismissal.
 5. The Honourable Court awards the Appellant Ksh.12,057.40 being accumulated service gratuity for 1 year worked
 6. The Honourable Court awards the Appellant Ksh.17,413.24 being compensation for unpaid amount for leave not granted
 7. The Honourable Court awards the Appellant Ksh.850 being compensation for unpaid amount for leave travelling allowance.
 8. The Honourable Court awards the Appellant Ksh.111,444.74 being compensation for unpaid overtime worked.
 9. The Honourable Court awards the Appellant Ksh.42,603.6 being compensation for unpaid public holidays worked.
 10. The Honourable Court awards the Appellant Ksh.117,979.20 being compensation for unpaid rest days worked.
 11. The Honourable Court awards the Appellant Ksh.27,255.51 being accumulated 12 months housing allowance.
 12. The Honourable Court awards the Appellant a Certificate of service.
 13. The Honourable Court awards the Appellant interest on the total.



14. The Honourable Court awards the Appellant cost in the Lower Court and on this Appeal to be borne by the Respondent.
3. The Appellant in his written submission dated 14th November, 2023 submits that on 25th April, 2021 employment was terminated without any grounds. He was called and told not to report to work.
4. It is his further submission and testimony that he was never taken to any disciplinary meeting despite the Respondent having his email address and phone number. He was not issued with any summons to a disciplinary hearing and therefore the fallacy and illegality of this termination. Again, the Respondent never filled any investigation report on the alleged theft and also did not report the theft to the police.
5. The Claimant in buttressing his case seeks to rely on authority of *Evans Ochieng Oluoch vs Njimia Pharmaceutical Limited* [2016] eKLR where the court held as follows;

The Claimant states that he was verbally terminated on the 17th December 2010 after making a request to go on leave. The Respondent on the other hand states that the Claimant deserted duty after being summoned to a meeting to discuss under performance of his duties. Desertion amounts to gross misconduct, it must be proved. It is not enough for an employer to simply state that an employee has deserted duty.

6. Further, the Respondent is supposed to show some efforts were made towards getting in touch with the Appellant when the allegation of desertion of duty is raised. Here, the *Njimia Pharmaceutical* case above had this to say;

“According to this letter, some effort was made to reach the Claimant. However, the claimant’s manager who is said to have made these efforts was not called as a witness and the court was therefore unable to assess the efficacy of these efforts. An employer relying on the ground of desertion of duty to justify a termination of employment must show that efforts have been made to get in touch with the deserted employee. As the very least, the employer must issue reasonable notice to the employee that the termination of employment is being considered.

7. It is his penultimate case and submission that his termination of employment was in breach of section 53(1) for want of reasons for termination and also section 45(2)(a)(b)(c) of the *Employment Act, 2007* in that no valid or fair grounds of termination were issued.
8. The Respondent’s case and submissions is one of the negligence on the part of Appellant in the performance of his duties. The Appellant was responsible for the following in his employment.
 - i. Ensuring none of the tools were stolen or mishandled.
 - ii. Screening of any individual entering or exiting the site.
 - iii. Reporting and supporting in investigations of any theft, loss or damage to tool or equipment located on the site.
9. It is the Respondent’s further case that the Appellant efficiently offered quality service for eleven months without complaints from the customer. All over a sudden in March 2021, all this change and the clients raised complaints of theft at the Bellvue site as follows;
 - i. On 3rd March, 2021 where the Respondent’s client alleged that metal rods worth Kshs.5,000/ = were stolen,



- ii. On 13th March, 2021 the Respondent's client alleged of 9 heavy steel pillars worth Kshs.90,000/=,
 - iii. On 24th March, 2021 alleged that 50 meters of heavy electric wire worth Kshs.1,000 per meter Kshs.50,000/= was stolen.
 - iv. As evidenced in the Respondent's Exhibit DW4 adduced before the Chief Magistrate's court (confirmation of meeting to discuss theft and consequence dated 15/4/2021). It became apparent that investigations into theft was paramount to deter any further losses for the Customer. The Respondent also indemnified the Customer for the losses incurred totaling to Kshs.145,000/= as a stop gap measure and immediately commenced investigations by requesting the Appellant herein to provide a written statement on the circumstances that resulted in the missing items (preliminary investigations indicated that the items in question went missing in the area and time when the Appellant was on duty). Unfortunately, the Appellant became elusive and declined to give a written statement to the Respondent. This was despite numerous calls and request by the Respondent to do so.
 - a. The failure by the Appellant to assist with the investigations was in direct contravention of one of his key responsibilities, i.e to assist in any investigations, especially in this particular instance the concerned investigations were related to a site he was securing
 - b. For these reasons the Respondent summoned the Appellant for a disciplinary hearing on 27th April, 2021 via a notice to show cause dated 26th April, 2021 and several follow up calls as evidenced by DW3, which evidence the Appellant never rebutted, however the Appellant declined to attend to the hearing and instead absconded from work never to be heard of again until when the Respondent was served with the primary suit documents.
 - h. Without the Appellant's cooperation and support with the investigation the Respondent was unable to defend itself against the Customer's claim and eventually the Customer terminated the contract on grounds of negligence and incompetence and further deducted the cost of the lost items from the Respondent's service fee due for the months of March and April,2021.
10. The Respondent further wishes to restate her case by rely on the following documents adduced at the lower court as evidence in support of her case.
- i) Written witness statements by DW1 Grace Waceke Thuku, DW2 John Wachira Mungai and DW3 Kenneth Gikunda.
 - ii) List of documents admitted as evidence by the Honourable Magistrate;DefenceWitness statementsConfirmation of meeting to discuss theft and consequence with the customerSummons for discliplinary hearingNHIF compliance certificateHuman Resource Policy and ProcedureLetter to Appellant's advocates on record forwarding the cheque for Appellant's salary for the month of March and April, 2021 and Certificate of service.Copy of Cheque andCertificate of service.
11. All these come in to reinforce the Respondent's case in opposition to appeal.
12. This court has taken time to scrutinize and re-look at the learned magistrate's performance and analyses of the matter placed before the lower court. It is evident that she looked at the facts and evidence pertaining to the issues in question. This led to a conclusion and determination in favour of the Respondent's case. This is the same here. The Appellant's conduct at the work place towards the dawn of his employment was unsatisfactory and I so find.



13. The Respondent's case overwhelms that of the Appellant on the test of preponderance of evidence. He brings out overwhelmed evidence in support of a case for desertion of duty by the Appellant. This was occasioned by his negligence of duty resulting in massive loss on the property of the Respondent's client. I therefore find a case of lawful termination of employment of the Appellant by the Respondent.
14. The 2nd issue for determination is whether the Appellant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to both the Appeal and the relief sought.
15. I am therefore inclined to dismiss the appeal with orders that each party bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF OCTOBER 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

Mr. Kamau instructed by Magonda & company Advocates for the Appellant.

Kanana Nyaga holding brief for Kinyua Awuor & Associates Advocates for the Respondent.

