Radar Limited v Mwadime & 8 others (Appeal E095, E089, E090, E091, E092, E093, E094, E096, E097 & E100 of 2024 (Consolidated)) [2024] KEELRC 2618 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2618 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E095, E089, E090, E091, E092, E093, E094, E096, E097 & E100 OF 2024 (CONSOLIDATED)

M MBARŨ, J

OCTOBER 24, 2024

BETWEEN

RADAR LIMITED ..... APPELLANT

AND

E095 PAUL MATENGE MWADIME ..... 1ST RESPONDENT

E089 GEORGE MALEKWA OKOTH ..... 2ND RESPONDENT

E090 GRANTON MWARINDA MWAMBURI ..... 3RD RESPONDENT

E091 OHOEBE MNAVU NGOCHO ..... 4TH RESPONDENT

E092 CAREN NALIAKA WASIKE ..... 5TH RESPONDENT

E093 WINFRE BAKARA MWAKINA ..... 6TH RESPONDENT

E094 APOLLO ROGE MGHONA ..... 7TH RESPONDENT

E096 JOSIAH MRIANGULO MWAMBINGU ..... 8TH RESPONDENT

E100 PHILIP NGAYAYA MWAKWENDA ..... 9TH RESPONDENT

(Being appeal arising from judgments delivered by Hon. Kithinji on 26 April 2024 in Voi MCELRC No.E012 of 2023, E006, E009, E010, E011, E013, E007, E004, E005 OF 2023)

JUDGMENT

1. The Appeal herein relates to several Appeals consolidated under ELRCA E095 of 2024 together with ELRCA E089, E090, E091, E092, E093, E094, E096, E097 and E100 of 2024. The Appeals arise from judgments delivered on 26 April 2024 in Voi MCELRC No E012 of 2023, E006, E009, E010, E011,

E013, E007, E004, E005 of 2023. The appellant is seeking that the judgments and all the processes flowing thereof be set aside and the claims by the respondents be set aside.

2. The main Appeal, ELRCA E094 of 2024, relates to a claim filed by Paul Matenge Mwadime. The other claims are similar to his case.

3. The claim is that Paul Matenge Mwadime was employed by the appellant in June 2017 as a security guard under a written contract earning a wage of Kshs 17, 820 per month. He worked diligently until April 2020, when his employment was terminated over a redundancy. On 7 April 2020, the appellant issued the respondent notice to take unpaid leave due to the COVID-19 pandemic. After 60 days, he resumed duty but was verbally informed that his employment had been terminated due to redundancy. He claimed that his terminal dues were not paid for 3 years, there was no hearing before termination of employment, and he found this was a malicious internal scheme of the appellant against him leading to unfair termination of employment. The appellant failed to follow the due process required under Section 40 of the *Employment Act* and no notice was issued to the labour officer or payments made under Section 49 of the Act due at Kshs 213,840 based on the last wage of Kshs 17,820.

4. The respondent also made his case that he worked overtime and was not compensated. Each day, he worked from 6 am to 6 pm, or vice versa, on night duty. The overtime was 4 hours daily for 26 days each month, amounting to Kshs 416, 988. He worked for 26 continuous days every month and was given four rest days contrary to Section 27 of the *Employment Act*. There was no payment of a house allowance, and the same is due at 15% of the gross wage at Kshs 2, 673 x 36 months total of Kshs 96, 228. The respondent claimed service pay for 3 years worked at Kshs 53, 460. Notice pay is claimed at Kshs 17, 820 and the total claims are;

    1. 12 months compensation for unfair termination of employment Kshs 213,840;

        a. Accrued leave Kshs 53,460;

        b. Overtime Kshs 416,988;

        c. Notice pay Kshs 17,820;

        d. Accrued house allowance Kshs 96,228;

        e. Service pay Kshs 53,460;

        f. Costs of the suit.

5. In response, the appellant admitted that the respondent was an employee and was paid according to the Regulation of Wages (General) (Amendment) Orders. The union and labour office were notified of the intended redundancy and the reasons thereof. The appellant followed the law and redundancy procedures. The respondent had a duty to apply for his annual leave by filling out forms available at the office. The salary paid included the standard overtime. The wage paid included a house allowance per the wage orders. Service pay is not due as the appellant paid statutory dues and complied with Section 35(6) of the *Employment Act*. The respondent was issued with sufficient notice of redundancy, and this arose after the government put a ban on rail travel affecting operations at the SGR, and there were no guards required at the terminus. The respondent had signed a contract that was automatically renewed, and based on the contract the appellant had with third parties; this fact was within the respondent's knowledge. The employment contract was tied to a third-party contract; hence, it would automatically lapse with it, and the claim for unfair termination of employment is not justified, and the claims should be dismissed with costs.

6. The trial court heard the parties and held that there was an unfair termination of employment and made the following awards;

    a. 5 months compensation Kshs 89,100;

    b. Leave pay for 3 years Kshs 53,460;

    c. House allowance at 15% Kshs 96,228;

    d. Four hours overtime for 3 years Kshs 416,988;

    e. Costs of the suit.

7. Aggrieved by the judgment, the appellant filed this Appeal on eight grounds;

    1. The learned magistrate erred in law and fact by finding that the respondent was entitled to the reliefs sought, yet he failed to discharge the burden of proof to the set standard.

    2. The learned magistrate erred in law and fact by failing to properly apply the circumstances of the case in exercising the discretionary powers in awarding compensation for 5 months for unfair termination, whereas the respondent had only worked for a short period.

    3. The learned magistrate erred in law and fact when the court awarded leave pay against the provisions of Section 28(4) of the *Employment Act*.

    4. The learned magistrate erred in law and fact in failing to consider that the claimant's salary included a house allowance as per the Wage Order for the various years of service.

    5. The learned magistrate erred in law and fact by awarding overtime pay, whereas the respondent had not established and proved to have worked overtime.

    6. The learned magistrate erred in law and fact in finding that the claimant was entitled to costs, yet they succeeded in part.

    7. The learned magistrate erred in law and fact when he failed to consider the appellant arguments, submissions and authorities when arising at the decision.

8. For the Appeal, both parties attended and agreed to file written submissions.

9. The appellant submitted that the respondent was employed under a simple contract of service from June 2017 to April 2020, when employment was terminated following the law. A one-month notice was issued dated 30 November 2020 through the union and the labour office, which indicated the reasons for termination of employment as redundancy. The respondent, instead of seeking assistance from his union to settle the matter, opted to file suit.

10. The appellant submitted that the claim for accrued leave is not justified as the same is made contrary to the provisions of Section 28(4) of the *Employment Act*. Under the *ILO Convention 132*, article 10 requires that the time at which the holiday is to be taken unless fixed, should be upon consultation with the employer. In the case of *Togom v Radar Limited* [2024] eKLR, the court held that the operative word under *Convention 132* in consultation with the employer before an employee can take annual leave.

11. In *Radar Limited v Daniel Jomo Machera* [2022] eKLR, the court held that the claim for unpaid leave days must adhere to the provisions of Section 28(2) and (4) of the *Employment Act*. The respondent failed to demonstrate that he applied for annual leave, and this was declined. Leave days not taken cannot accrue beyond 18 months, as held in *Luka Mbuvi v Economic Industries Limited* [2020] eKLR.

12. The claim for overtime is not justified, and the respondent failed to demonstrate that there was overtime work. In the case of *Ngunda v Ready Consultancy Limited* Civil Appeal 129 of 2019, the court held that payment for claimed 33 public holidays, 152 Sundays, and 5184 hours of overtime was not justified, and an assessment of the claim does not demonstrate that these claims were properly established. In this case, the respondent claimed 104 hours of overtime without establishing the basis. Without producing any tangible evidence, the general claim for overtime pay should be dismissed.

13. The appellant submitted that the claim for overtime is not due since the appellant complied and paid are regulated under the Wage Orders. In the case of *Shanga Kitsao Mumbasa v Mabati Rolling Mills* [2017] eKLR, where the wage paid is under the applicable wage Orders, a house allowance is inclusive. In *BIFU v Maisha Bora Sacco Society Ltd* [2018] eKLR, the court held that under Section 49(1) of the *Employment Act*, the employee can be paid a maximum of 12 months based on gross salary but the Act does not define what gross salary means. In this case, it would be a wage paid upon statutory deductions. The respondent's pay slip indicates a gross salary, which includes the due house allowance.

14. In 2017, the Regulation of Wages (General) (Amendment) Orders had a basic wage of Kshs 12,926 plus 15% house allowance, totalling Kshs 14,864, while the respondent earned Kshs 17,820 per month over and above the gross minimum. From 2018 to 2020, the minimum wage was Kshs 13, 572 plus a 15% house allowance. The total due was Kshs 15, 607, while the respondents earned Kshs 17, 820.

15. The appellant submitted that the alleged unfair termination of employment is not correct since there was adherence to the provisions of Section 40 of the *Employment Act*. The appellant submitted exhibit No 6, the employment contract, and clause 8.3, which provided that the contract was tied to the third party contract, which automatically terminated upon the termination of the contract by the third party. In the case of *Walwanda v Radar Security Limited* [2022] eKLR, the court held that the employee lost employment when the employer lost its contract with a third party. It was not anyone's fault, and it amounted to a redundancy. The reasons leading to the termination of employment were justified. They cannot be blamed on the appellant as held in the case of *Jared Mangera & 11 others v Professional Clean Care Limited* [2018] eKLR.

16. The trial court failed to analyze the entire record and circumstances leading to the termination of employment, and the award made should be set aside or reviewed with costs.

17. The respondent submitted that the findings by the trial court were correct and should be confirmed, and the Appeal was dismissed with costs. The findings that there was unlawful termination from employment due to a redundancy were correct. The respondent worked as a guard from June 2017 to April 2020, when the redundancy was declared. Under Section 107 of the *Evidence Act*, he who alleges must prove. The statutory burden for a claim of unfair termination of employment is Section 47(5) of the *Employment Act*. In the case of *Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Limited* [2013] eKLR, the court held that where an employer declares a redundancy, the procedure to follow is as set out under Section 40 of the *Employment Act*.

18. In this case, the respondent contended that termination of employment was without due process or any substantive justification. The identification of the employees to be affected was not based on any criteria, nor was the employee allowed a hearing. The required notices to be issued within 30 days were ignored, resulting in a summary action against the respondent. In the case of *Kenya Airways Limited v Aviation & Allied Workers Union (Kenya) & 3 others* [2014] eKLR, the court held that justification of redundancy is one crucial aspect. The other equally important aspect is procedural fairness.

19. In this case, the appellant failed to justify or ensure procedural fairness. The alleged loss of a contract with SGR was not a proper and justifiable reason for declaring a redundancy that resulted

in termination of employment. By the time the contract ended, the respondent had already lost employment. There was no evidence that the respondent deserted duty.

20. In evidence, the appellant called its witness, who failed to articulate the procedures taken before termination of employment. There was no evidence that the respondent was consulted before the decision to declare the redundancy. The dues were not paid under Section 40 of the *Employment Act*, such as leave pay, severance pay, and notice. In the case of *Ahamed Mwarunmba Mwavita v Kocos Kenya Limited* [2021] eKLR, the court held that where an employer fails to submit evidence to demonstrate how it ensured that the mandatory provisions of Section 40 of the *Employment Act* were adhered to, such a redundancy amounts to unfair termination of employment contrary to Section 43 and 45 of the Act.

21. The trial court was correct to ward 4 months for unfair termination of employment, accrued leave days, overtime worked and accrued house allowances.

Determination

22. This is a first Appeal. The court is required to reevaluate the record, reassess it, and make its conclusions. However, the trial court had the opportunity to hear the witnesses in court.

23. At the heart of the Appeal is the award of five months' compensation, leave pay, a house allowance, overtime, and costs.

24. Through notice dated 7 April 2020, the appellant sent the respondent on unpaid leave due to the COVID-19 pandemic. The client where the respondent was placed was forced to reduce personnel and terminate assignments, causing economic downturns. The unpaid leave was for 60 days following the government ban on travel.

25. Through notice dated 30 November 2020, the appellant notified the Kenya National Private Security Worker's Union of the intended redundancy. The basis was that on 12 November 2020, the applicant's assignment at SGR, where the respondent was placed as a security guard, terminated its contract due to cessation of movement and COVID-19 effects.

26. A similar notice was issued to the County Labour Commissioner at Nairobi, but this office has no forwarding address. Such an office is nonexistent and not identical to those defined under the *Employment Act* or *Labour Relations Act*.

27. Indeed, a redundancy is envisaged under Section 40 of the *Employment Act* and upon the requisite notices, the employer is allowed to terminate employment. In this case, the appellant pleaded under paragraphs (5) and (6) of the response that there was a notice of intention to declare a redundancy issued to the respondent and the union. This is a mandatory requirement under Section 40(1) of the *Employment Act*. However, notice to the union and labour office should be followed with notice to the affected employees.

28. In the case of *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA, the court held that;

> While the requirement of consultation was not expressly provided in section 40 of the *Employment Act*, that requirement was implied as the main reason and rationale for giving the notices in section 40(1)(a) and (b) to the unions and employees of an impending redundancy. Section 40(1) of the Act did not expressly state the purpose of the notice. Although it also did not explicitly provide consultation between the employer and the employees or their trade unions before the decision on redundancy was made, the

requirement for consultation was provided in Kenyan law and implicit in the *Employment Act* itself.

29. In the case of *Kenya Union of Commercial Food and Allied Workers v Nerix Pharma Limited* ELRC Cause No E 532 of 2021, the court held that;

> Section 40 of the *Employment Act* prohibits employers from declaring employees redundant unless they comply with the procedure prescribed thereunder. The procedure requires the following:-
>
> a. The employer must issue a notice of the intended redundancy to the employee and the local labour office. Where the employee is a member of a Trade Union, the notice should be addressed to the Trade Union. The notice must be issued at least one month before the date of termination and must state the reason for and extent of the proposed redundancy.
>
> ...

30. On the content of the notice, it is first required to disclose the reason for the proposed redundancy. Second, the notice ought to show the extent of the redundancy.

31. The notice issued to the respondent after the notice to the union and County Labour Commissioner on 30 November 2020 is glaringly absent in this case.

32. Similarly, after the notice to take unpaid leave on 7 April 2020, the appellant issued the respondent a Certificate of Service indicating that employment ceased on 8 April 2020.

    This disparity is not addressed.

33. Where unpaid leave was to last for 60 days, employment cannot be terminated the day after the appellant notified the respondent to take leave. The filed records speak to a different set of facts contrary to what the appellant has submitted.

34. Indeed, the respondent, in paragraph (5) of the Memorandum of Claim, has corroborated the appellant's assertion that employment was terminated in April 2020.

35. Therefore, the redundancy notices issued to the union and County Labour Commissioner on 30 November 2020 and the third-party contract terminated on 18 November 2020, which, hence, affected the respondent in his employment, are not correct. The records filed speak to a different story.

36. In my view, these issues go to the root of the validity of the process. They questioned the lawfulness of the appellant's decision to terminate the respondent's contract because of redundancy. Where indeed the appellant lost its contract with a third party in November 2020, to proceed and terminate the respondent's employment in April 2020, way before he completed his unpaid leave of 60 days and received the notices of the intended redundancy, was premature termination of his employment. This is contrary to Sections 40, 43 and 45 of the *Employment Act*. See Kenya Union of Commercial Food and Allied Workers v Nerix Pharma Limited ELRC Cause No E 532 of 2021 that;

37. Under section 45 of the *Employment Act*, for an employer to prove the reasons for termination of a contract of service on account of redundancy, he is required to provide evidence on the following:-

> That the reason for the termination is valid;
>
> That the reason for the termination is a fair reason based on the operational requirements of the employer;

That the employment was terminated under fair procedure.'

38. The learned magistrate analyzed the evidence and observed at paragraph 21 that;

> The respondent [appellant] has exhibited a letter of 30/11/2020, 7 months later, addressed to the General Secretary of Kenya National Private Security Workers Union. It was stamped and received by the union on 2/12/2020. It is referenced as a notice of intended redundancies, and the same grounds are given. ...

39. The findings of unfair termination of employment of the respondent's employment cannot be faulted.

40. The notice pay and compensation awarded are well rationalized and given a basis.

41. On assessing the claims made, taking annual leave is a right under Section 28 of the *Employment Act*. Where leave is accrued over the years, at the end of employment, unless the employee has placed an application and the same is declined by the employer for stated reasons, leave can only be accrued under the provisions of Section 28(4) of the *Employment Act* as held in the case of *Charles Nyaringo Rianga v Hatari Security Guards* [2019] eKLR.

42. In this case, without the appellant submitting any work records on how the respondent was allocated his annual leave days, the claims can only go back to 18 months, a total of 33 days. On the basic wage of 17,820 per month, accrued leave pay is Kshs 19, 602.

43. Overtime was claimed on the basis that the respondent worked for 12 hours each day and only took 4 days of rest each month, for a total of 26 days.

44. Whereas the Regulations relating to the security sector differ from those of general workers, the parties did not submit any Wage Orders. The *Regulation of Wages (Protective Security Services) Order, 1998* regulates security guards. The work hours are stipulated under these Wage Orders. In a week, the employee is allowed to work for 6 days to allow a rest day and a total of 52 hours, which is 8 hours each day. Where there is work beyond the legal minimum, and as permitted under the Wage Orders, such work should be paid in overtime. See *Yaa v SGA Security Solutions Limited* (Employment and Labour Relations Appeal E002 of 2022) [2022] KEELRC.

45. The appellant did not submit any work records on the hours of work. Indeed, the learned magistrate examined this aspect and established that the appellant failed to address the provisions of Section 10 of the *Employment Act* on the production of work records as the employer.

46. It is insufficient to deny that there was no overtime or that this was paid with the monthly wage. Work records on the respondent's time sheets would have served a primary purpose in proving whether there was overtime work or not.

47. The overtime claim for 4 hours each day is found justified on a wage of Kshs 17, 820 per month.

48. On the claim for a 15% house allowance, the respondent was working at Voi. His minimum wage under the Wage Orders was Kshs 6, 896.15 from 2017 to April 2018. The house allowance due is Kshs 1, 034.40, and the gross wage due is Kshs 7, 930.40.

49. The respondent was paid Kshs 17, 820, which is over and above the gross minimum due. The wage addressed the payable house allowance and the overtime worked. To pay beyond the wages received would result in unjust enrichment.

50. Under the *Regulation of Wages (Protective Security Services) Order, 1998*, service pay is payable despite the employer paying statutory due, unlike other Wage Orders for different sectors. The claim for service pay for a work period is justified and lawful. The award of Kshs 53, 460 is justified.

51. The appellant challenges the award of costs because, in employment claims, parties should take into account the economic factors and avoid crippling employers. However, the award of costs is discretionary, and unless the same is applied without due consideration and based on compelling reasons, the court should not interfere with the same. In this case, the trial court did not assign any reasons for awarding costs save to state that costs follow the cause, which is not the case under Section 12 (4) of the *Employment and Labour Relations Court Act*. The court should give reasons for awarding costs.

52. In this case, it is imperative to take into account the circumstances leading to loss of employment. The appellant failed to submit key records, as noted by the trial court. Had the respondent been given the appropriate notices and his union informed in time, the proceedings herein would have been avoided.

53. The costs as awarded by the trial court shall suffice.

54. Accordingly, judgment in Voi MCELRC E012 of 2023 is hereby reviewed in the following terms;

    a. Compensation at 5 months gross wage Kshs 89, 100;

    b. Notice pay Kshs 17, 820;

    c. Service pay Kshs 53, 460;

    d. Costs of the lower court proceedings, for the Appeal, each party to bear its costs.

55. The judgment herein applies in the following Appeals;

    1. Appeal No E089 of 2024

    2. Appeal No E090 of 2024

    3. Appeal No E091 of 2024

    4. Appeal No E092 of 2024

    5. Appeal No E093 of 2024

    6. Appeal No E094 of 2024

    7. Appeal No E096 of 2024

    8. Appeal No E097 of 2024

    9. Appeal No E100 of 2024.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 24 DAY of OCTOBER 2024.

M. MBARŨ

JUDGE