



Wainaina v Cobra Security Services Limited (Employment and Labour Relations Appeal E019 of 2023) [2024] KEELRC 13296 (KLR) (27 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13296 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E019 OF 2023
AN MWAURE, J
NOVEMBER 27, 2024**

BETWEEN

PAUL THUO WAINAINA APPELLANT

AND

COBRA SECURITY SERVICES LIMITED RESPONDENT

(Being an Appeal from the judgment of the Honorable (SRM) Mr. E.S Soita delivered on 27th June 2023 in Nakuru MCELRC No. E155 OF 2021)

JUDGMENT

1. The Appellant being dissatisfied by the judgment of the Honorable Senior Resident Magistrate Mr. E. S. Soita filed this appeal vide a Memorandum of Appeal dated 27th June 2023 on grounds that: -
 1. The Learned Trial Magistrate erred in both law and fact by holding that the Appellant herein had not proved on a balance of probabilities that his termination was unfair.
 2. The Learned Trial Magistrate erred both in law and fact in paying undue consideration to typographical errors in the proceedings to find that the Appellant herein had not proved on a balance of probabilities that termination was unfair.
 3. The Learned Trial Magistrate erred both in law and fact by failing to consider that the Respondent's assertions that the Appellant deserted duty was not proved on a balance of probabilities.
 4. The Learned Trial Magistrate erred both in law and fact in finding that the Respondent herein issue the Appellant with a termination letter but failed to consider that the mandatory statutory due process with regards to substantive and procedural fairness was not followed prior to termination and issuance of a termination letter.



5. The Learned Trial Magistrate erred both in law and fact by failing to award compensation under section 49(c) of the [Employment Act](#), 2007.
 6. The Learned Trial Magistrate erred both in law and in fact by holding that on the basis that the court found that termination of employment was unfair, the other remedies sought by the Appellant herein fail.
 7. The Learned Trial Magistrate erred both in law and fact by failing to award one month's compensation in lieu of notice, underpayment, housing allowance, normal overtime, off/rest days, illegal deduction, unpaid salaries, annual leave, severance pay, service pay and public holidays to the Appellant herein on account that the Appellant had not proved on a balance of probabilities that termination was unfair.
2. The Appellant prays that:
- i. The Honourable Court be pleased to order that the Appellant's termination was unfair and to thereof award the remedies sought for compensation under section 49(c) of the [Employment Act](#) as well as one month's pay in lieu of notice and severance pay.
 - ii. The Honourable Court be pleased to allow the Appeal by setting aside the judgment of the Honourable Trial court to the extent that the Appellant herein had not proved on a balance of probabilities that his termination was unfair and that on the basis that the court found that termination of employment was unfair, the other remedies sought by the Appellant herein fail.
 - iii. The Honourable Court be pleased to order that the Appellant's claims for underpayments, housing allowance, normal overtime, off/rest days pay, illegal deductions, unpaid salaries, annual leave, service pay, and public holidays were not pegged on the claim for unfair termination and to thereof consider the said claims independently by perusal of the pleadings by parties, oral evidence as well as submissions and make awards thereof.
 - iv. The costs of this Appeal be awarded to the Appellant.
3. Both parties canvassed the appeal by way of written submission.

Appellant's Submissions

4. The Appellant submitted that he was an employee of the Respondent earning Kshs.7,000/= with a house allowance of Kshs.1,050/= totaling to Kshs.8,050/=.
5. The Appellant submitted that the trial court, in its judgment delivered on 27th June 2023, overlooked the Appellant's designation and focused solely on the issue of termination. The court concluded that the termination was not unfair; however, all other claims were dismissed except for the certificate of service and costs borne by the respondent
6. The Appellant submitted that the evidence on record clearly shows that he worked as a night guard and the respondent's witness did admit that he was working as a night guard and urged this Honourable Court to find that he was employed as a night guard.
7. The Appellant submitted that he was unfairly terminated because he deserted work. The Appellant relied on sections 41 and 47 of the [Employment Act](#) regarding substantive and procedural justice which was in favour of the respondent.
8. In Stanley Omwoyo Onchweri V Board of Management Nakuru YMCA Secondary School (2005) eKLR the court held that desertion can only take place where an employee leaves employment with



- the intention of not returning or formulating such intention not to return after leaving work. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence, and nature of employee's duties.
9. The Appellant urged this Honourable Court to reconsider the evidence on record since the trial court did not consider the evidence and relied on the record that the Appellant was unfairly terminated by the respondent.
 10. The Appellant submitted that he is entitled to compensation for unfair termination as provided under section 49(c) of the *Employment Act* and cited the cases of Paul Wafula V Century Feeds Ltd Nakuru E& L R Cause No. 186 of 2018(unreported) and Daniel Mburu V Hygrotech East Africa Ltd [2021] eKLR the court held that the maximum compensation for unfair termination should be 12 month's salary.
 11. The Appellant submitted that he is entitled to be awarded Kshs.193,724.40/= as pleaded in the memorandum of claim dated 18th July 2022.
 12. The Appellant submitted that he is entitled to one month's pay of Kshs.16,143.70/= together with Kshs.1,878/= which was unjustifiably deducted from his due adding up to Kshs. 18,021/= according to Government Legal Notice No. 2 of 1st May, 2018. The Appellant relied on section 35 of the *Employment Act* and James Ochar Oyoo V Sunripe Alpha Academy (Supra) where the court awarded one month's pay in lieu of notice.
 13. The Appellant submitted that he is entitled to the illegal deduction as pleaded and relied on section 18(4) of the *Employment Act* provides as follows:

“Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances, and benefits due to him up to the date of his dismissal.”
 14. In Kennedy Mutua Mwangangi V Madison Insurance Company (K) Limited [2020] eKLR the court held that the deduction of ksh.20, 000/= from the claimant's salary from February, 2014 was unlawful.
 15. The Appellant submitted that he is entitled to compensation for underpayment, which should be evaluated based on its merits. He cited the cases of Timothy Sangore V Biashara Masters Limited [2019] eKLR and Collins Wanjala Lukorito V Midal Group (K) Limited [2020] eKLR. In these cases, the court determined that the claimants were underpaid, which contrasted with the Wage Orders Regulation of Wages (General) (Amendment) Order, 2018.
 16. The Appellant submitted that he is entitled to the house allowance relying on the *Labour Institutions Act* and Legal Notice No. 197 of 1st May 2013, Legal Notice No. 116 of 1st May 2015, Legal Notice No. 112 of 1st May 2017 and Legal Notice No. 2 of 1st May 2018.
 17. The Appellant submitted that he is entitled to normal overtime and relied on sections 9, 10, and 74 of the *Employment Act*. In Mark Ngaira Ibochio V World Class Cities Ministries [2019] KEELRC 1810 (KLR) the court held that awarded for overtime as under the regulation of wages a night guard is allowed to work at 12 hours per day. The claimant based the tabulation on 5 hours per day which assessed on its merits should be Ksh.124,348.60 for each extra hour at work for 6 days in a week.
 18. The Appellant submitted that he is entitled to annual leave amounting to Kshs.49,983.42/=. In the case of Mark Ngaira Ibochio V World Class Cities Ministries(supra), the court stated that annual leave is a right due to every employee pursuant to the provisions of section 28 of the *Employment Act*, 2007. Where leave is not taken when due, a payment in lieu is the compensation and the claimant was awarded Ksh.55,881.95 for not taking his annual leave.



19. The Appellant submitted that he is entitled to be awarded dues for public holiday relying on the case of James Ochar Oyoo V Sunripe Alpha Academy(Supra) where the court held that every employee is entitled to an off day/rest day for every 7 days of work pursuant to Section 27 of the Employment Act and compensated the claimant for the public holidays he worked.
20. The Appellant submitted that he is entitled to unpaid salaries.
21. The Appellant submitted that he is entitled to service pay and relied on the case of Stephen Ombaki Momanyi v Bedrock Holdings Limited [2019] KEELRC 369 (KLR) the court awarded for service pay as e claimant is entitled to pay for 15 days for each full year worked.

Respondent's Submissions

22. The Respondent submitted that Section 47(5) of the Employment Act deals with unfair termination and provides as follows:

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

23. The Respondent submitted that the termination was justified as the appellant deserted the workplace and the trial court findings were based on the employment contract terms which permitted summary dismissal under such circumstances in accordance with Section 10(i) of the Employment Act provides that:

“The company will summarily dismiss an employee on the circumstances hereunder:

- i. If without leave or other lawful cause an employee absents himself from the place of appointment for the performance of his work.

24. The Respondent submitted that it provided the summary dismissal letter dated 21st November 2020 outlining the reason for the Appellant’s summary dismissal as desertion of duty. Section 44(1) of the Employment Act provides that:

“Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.”

25. The Respondent submitted that it had attempted to arrange a formal meeting with the appellant to address his absenteeism, but he did not attend. Additionally, the Respondent also submitted that the appellant appeared before the labour office to collect his terminal dues, but he refused to engage in any potential disciplinary proceedings.

26. In Caliph Properties Limited V Barbel Sharma & another [2015] eKLR the court stated that:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently he has not done equity.”



27. The Respondent submitted that it presented evidence to justify the dismissal stated in the summary dismissal letter dated 21st November, 2020 and argued that the Appellant was rightfully dismissed. The Appellant claimed he was unaware of the reasons for his termination, alleging it was due to the Respondent's failure to remit his statutory dues.
28. However, the trial court found this claim dishonest, noting the Appellant realized the alleged issue on 9th November, 2019, but was not dismissed until 14th November, 2020, over a year later. The trial court concluded that the Appellant's hands were unclean and found his testimony dishonest.
29. Sections 10(7) and 74 of the *Employment Act* provides that the burden of proof on the employer to show a fundamental breach of the terms of engagement by the employee. The Respondent submitted that it met this burden by presenting evidence to the court indicating that the Appellant breached the terms of engagement.
30. The Respondent submitted that the evidence tendered by the Appellant did not prove that his termination of employment, by the Respondent was in any manner unlawful as alleged.
31. In *Kenya Revenue Authority V Reuvel Waithaka Gitahi & 2 Others* (2019) EKLRC, in which the Court of Appeal expressed itself in as follows:
- “The appellant employee in this case had the burden to prove not only that his services were terminated but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43(1): “to prove the reason or reasons or the termination,”
32. In *Kennedy Maina Mirera V Barclays Bank of Kenya Limited* [2018] eKLR the court held that there were valid reasons given for the termination of employment as there was evidence rendered in support.
33. The Respondent submitted that the appellant failed to prove his claim under section 47(5) of the *Employment Act* read with sections 107 and 108 of the *Evidence Act*.
34. The Respondent argued that the grounds for dismissal are outlined in section 43(1) of the *Employment Act*. The standard of proof required is based on a balance of probabilities, not beyond a reasonable doubt, as the trial court indicated in its judgment. Therefore, the Respondent submitted that this standard was met, leading to the termination of the appellant's services.
35. In *Kenya Revenue Authority* (Supra) the Court of Appeal stated:
- “We have carefully re-evaluated the evidence on record on this issue and we think, with respect, that the trial court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the Act. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required.
- The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee's services. That is a partly subjective test.”



36. In *Bamburi Cement Limited V William Kilonzi*[2016] eKLR court stated on the nature of proof required as follows:

“The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds. According to section 47(5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing.....The test to be applied is now settled.”

37. In *Halsbury's Laws of England*, 4th Edition, Vol 16(1B) para 642, thus: -

“In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. [if the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

38. The Respondent submitted that it gave evidence establishing the Appellant's gross misconduct breaching his employment contract and he did not deny the contents of the employment contract acknowledging that he signed the same.

39. The Respondent submitted that the appellant is not entitled to one month's pay in lieu of notice on the grounds that the Appellant was summarily dismissed in accordance with section 44 of the *Employment Act* which required no notice

40. In *Stephen Wasike Wakhu & another V Security Express Limited* [2006] eKLR the court stated as follows:

“A party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to decide as to whether the relief sought is available. Hence the legal dictum that “he who alleges much prove.”

41. The Respondent submitted that the Appellant is not entitled to the illegal deduction as the burden of proof lies on him to demonstrate the said illegal deduction was made but the same was not proved in according to Sections 107 and 108 of the *Evidence Act*.

42. The Respondent submitted that the appellant was paid the house allowance as per the terms of his contract of service therefore the Respondent is not liable to pay the same in excess.

43. The Respondent submitted that the appellant is not entitled to overtime dues as the same that was owed was already paid.

44. The Respondent submitted that the appellant is not entitled to annual leave as it complied with Section 28(1) of the *Employment Act* which provides as follows:

1) An employee shall be entitled—



- (a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;
- (b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.

45. The Respondent submitted that the appellant is not entitled to holiday pay and this Honourable Court to dismiss the prayer as the same is not proven.
46. The Respondent submitted that it remitted both NSSF and NHIF as per the pay slip produced before this Honourable Court and the Appellant should claim the amount from the relevant bodies.

Analysis and determination

47. As the first appellate court, this court has a duty to consider the evidence adduced before the trial court and re-evaluate it so as to draw its independent conclusion and to satisfy itself that the conclusions reached by the trial magistrate are consistent with the evidence See *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123.
48. The court has considered the pleadings as per the memorandum of appeal dated 3rd July 2023 and the aforementioned submissions by the respective parties and finds the main issue is whether the Appellant was fairly terminated.
49. In *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR the court held:

“The law on termination of contracts of service in Kenya is now largely governed by the [Employment Act](#), 2007. Of significance in this respect are sections 41, 43, 44, 45, and 47 of the Act.

Section 41(1) of the Act provides as follows: -

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

50. Section 43 provides as follows:

- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

Section 45 of the Act provides in part as follows: -

- “(1) No employer shall terminate the employment of an employee unfairly.



- (2) A termination of employment by an employer is unfair if the employer fails to prove: -
- (a) That the reason for the termination is valid;
 - (b) That the reason for the termination is a fair reason: - Related to the employees conduct, capacity or compatibility; or Based on the operational requirements of the employer; and That the employment was terminated in accordance with fair procedure.”

Section 47(5) of the Act stipulates as follows: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

51. Justice Manani in *Galgalo Jarso Jillo V Agricultural Finance Corporation* [supra] held as follows:

“My understanding of these provisions of law is that they seek to substantially regulate termination of contracts of service particularly by an employer. First, an employer may not terminate an employee except for good cause. Some of the grounds that constitute good cause under section 41 of the Act are: poor performance; physical incapacity; and gross misconduct. Section 40 of the Act provides redundancy as the other substantive ground for termination but which is unrelated to those set out under section 41. But even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural strictures to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee. The employer has to: provide the employee with details of the accusations against the employee; allow the employee an opportunity to respond to the charges; allow the employee to be accompanied by a shop steward or co-employee of his choice during the process; and finally provide the employee with a decision either terminating or saving the contract of service. Where the employer fails to do the foregoing, the resultant termination is deemed unlawful. And in law, the burden of justifying the lawfulness of the termination both in terms of whether there was a substantive ground to terminate and whether procedure for release of the employee was adhered to lies with the employer.”

52. The trial court in its judgment delivered on 27th June 2023 stated that the appellant was fairly terminated failing to apply the concept that substantive justification and procedural fairness go hand in hand in accordance to Sections 41 and 43 of the *Employment Act*.

53. The respondent in his defence averred that the appellant was terminated for a good course: desertion. He claims that the claimant deserted employment from 14th November 2020 until the day he was issued with a dismissal letter dated 21st November 2020. The law pertaining to desertion of employment is now settled. The employer should invite the employee for a disciplinary hearing on the grounds of the said desertion and inform the said employee that they are considering terminating him on the basis of the said desertion.

54. The Respondent did not present any evidence before the trial court that such process was followed. That was a great failure on the part of the respondent. The trial court should have considered the same.

55. At the same time the Respondent did not invite the Appellant for a disciplinary hearing as provided in Section 41 of the *employment Act*. The same provides as stated hereunder:



41.

- (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

56. The case of Stanley Omwoyo Onchari -vs- Board of Management Nakuru YMCA Secondary School (2005) eKLR provide the established jurisprudence for termination of an employee on the basis of desertion.

The trial Magistrate did not address the trite law on substantial and procedural justification that an employer must adhere to as they embark on summarily dismissing an employee.

57. The court therefore finds the trial court erred in finding that the Respondent terminated the Appellant lawfully and procedurally and therefore the court proceeds to set aside the judgment of the trial court and gives the remedies thereunder to the Appellant: -

- a. The claimant is awarded 10 months equivalent of his salary as his compensation
@ Kshs.16,143 x 10 = Kshs.161,430/=
- b. One month salary in lieu of notice – Kshs.16,143/=
- c. Claim for house allowance and underpayment of wages are all not proved as generally prayed and are both declined.
- d. Also prayers for overtime are in the ambit of special damages and are also not proved and so all declined.
- e. The same applies to public holidays and are also not proved and so are declined.
- f. This was not a termination by redundancy and so severance pay is not proved and so is declined as well.
- g. Service pay is also not proved as the payslip which is part of the courts documents demonstrate deductions of National Social Security Fund (NSSF) dues. The Appellant should demonstrate that the same were not remitted to NSSF.
- h. The total award of the compensation dues to the Appellant are Kshs.177,573/=.
- i. The appellant is awarded costs of the lower court proceedings and of this appeal.
- j. He is also allowed interest at 14% per annum from date of this judgment till full payment.
- k. Appellant is to be given his certificate of service within 30 days hereof.

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF NOVEMBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

