



**SGA Security Solutions Limited v Mugenya (Appeal E126 of 2023)
[2024] KEELRC 13214 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13214 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E126 OF 2023
AK NZEI, J
NOVEMBER 22, 2024**

BETWEEN

SGA SECURITY SOLUTIONS LIMITED APPELLANT

AND

KELVIN ODHIAMBO MUGENYA RESPONDENT

JUDGMENT

1. The Appellant herein was the Respondent (defendant) in Mombasa Chief Magistrate’s Court Employment Case No. 226 of 2021 whereby it had been sued by the Respondent herein seeking the following reliefs:-
 - a. A declaration that the Respondent’s dismissal from employment was unfair and wrongful.
 - b. One month salary in lieu of notice Kshs.31,808.38.
 - c. House allowance for 28 months at the rate of 15 percent¹⁵/100 x 31,808.38 x 28 Kshs.133,595.20.
 - d. Unpaid leave days 21 x 1,060.30 x 3 Kshs.66,798.90.
 - e. Payment for the term of contract (31,808.38 x 12) Kshs.381,700.56.
 - f. Compensation for unlawful termination (31,808.38 x 12) Kshs.381,700.56.
 - g. Unpaid overtime (205.10 x 1 hour x 30 days x 28 months) Kshs.172,284.
 - h. Service pay (Kshs.31,808.38/2 x 3).....Kshs.47,712.57.
 - i. Costs of the suit and interest.



2. Documents filed alongside the Respondent's Statement of Claim dated 17th March, 2021 and filed in Court on 15th April, 2021 included the Respondent's affidavit sworn on 17th March, 2021 in verification of the claim, written witness statements of the Claimant and Titus Mulei, both dated 17th March, 2021, and an evenly dated list of documents listing five documents. The listed documents were copies of the Respondent's identity card, letter of confirmation of appointment, bundle of payslips, letter of summary dismissal and the Respondent's demand letter.
3. The Respondent had pleaded:-
 - a. that he was employed by the Appellant on permanent basis as a driver on 16th May, 2018, earning a monthly salary of Kshs.31,808.38.
 - b. that on 15th November, 2020, the Respondent's agents organized for a meeting with some of the Respondent's employees in Diani, Kwale County, whereat the employees were coerced to change their employment status from permanent employment to contract basis.
 - c. that it was a term that once the Respondent signed the employment contract, the Appellant ought to have paid all previous benefits under the previous employment; and that the Respondent would also take a two weeks off because employees would not take their usual two weeks December off for the year 2020.
 - d. that on or about 11th December, 2020, while on his two weeks leave, the Respondent's employment was unfairly summarily terminated by the Appellant without the Respondent being accorded a fair hearing as by law stipulated.
 - e. that the Respondent was never allowed to take all his leave days for the entire period of employment.
 - f. that the Respondent worked for extra hours without pay.
 - g. that the Respondent was not paid house allowance for the duration of employment; and that the Appellant did not pay (remit) the Respondent's statutory deductions (NSSF and NHIF).
 - h. that termination of the Respondent's employment was effected without notice, without a valid reason, and without following the procedure set out in the *Employment Act*.
4. It was the Respondent's further pleading that the Appellant coerced him to sign a contract varying his employment status without following due process, and failed to pay his terminal dues.
5. The Appellant entered appearance on 27th April, 2021 and subsequently filed response to the Respondent's claim, denying the same. The Appellant further pleaded:-
 - a. that the Appellant admitted having employed the Respondent as a driver, but denied having employed him on permanent basis on 16th May, 2018; and denied that the Respondent's monthly salary was Kshs.31,808.38.
 - b. that the Appellant denied having coerced the Respondent to change his employment status from permanent to contract basis, and denied having given the Respondent a two weeks' off.
 - c. that the Appellant denied having summarily terminated the Respondent's employment while on his two weeks' off, and without according him a fair hearing and without following due procedure.



- d. the Appellant pleaded that the Respondent absented himself from duty without explanation to his supervisors, and could not be traced, forcing the Appellant to dismiss him summarily on 11th December, 2020; and denied having dismissed him unfairly.
 - e. the Appellant further denied the allegations of untaken leave days, overtime (extra) hours worked, unpaid house allowance and unremitted statutory deductions.
6. The Appellant further pleaded that having been summarily dismissed, the Respondent was not entitled to notice pay, that the Respondent was being paid house allowance, took his leave days, never worked extra hours, was a contributing NSSF member and therefore not entitled to service pay, and was not entitled to any compensation or damages.
 7. Documents filed alongside the Appellant's response to claim included written witness statements of Fenny Atieno Odhiambo and Emanuel Angore and a list of documents dated 21st October, 2021, listing 5 documents. The listed documents were leave application forms, warning letters, loan application forms, loan statement reports and a summary dismissal letter dated 11th December, 2020.
 8. Subsequently, the Appellant amended its response to claim and introduced a Counter-claim against the Respondent, seeking payment of Kshs.126,131.74 "being compensation of the payment of loan arrears." The Appellant pleaded that at the time of dismissal, the Respondent had an outstanding loan of Kshs.77,449/= from Alarm Sacco and another loan of Kshs.61,063/= from Security Group Sacco, a total of Kshs.138,512/=, and that the Appellant had deducted Kshs.12,386.26 from the Respondent's terminal dues.
 9. The Respondent filed reply to the Appellant's response to claim and response to the Counter-claim, and denied the same (Counter-claim). The Appellant filed supplementary witness statements of Patrick Kilonzo and Emanuel Angore, both dated 28th April, 2023.
 10. At the trial, the Respondent, being the Claimant in the primary suit, adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 2 of this Judgment. He denied having absconded duty on 15th November, 2020, and testified that on that date, he was presented with fresh terms of employment from permanent to contract basis, and that he signed the contract on 28th November, 2020. That he was on leave when he signed the contract, which was to take effect when he reported back. That on reporting back on 12th December, 2020, he learnt that his employment had been terminated. That he had not received any communication on the Respondent's intention to terminate his employment. That he was not given an opportunity to defend himself. That he (the Respondent) was paying his loans, and that the Appellant was not his guarantor.
 11. Cross-examined, the Respondent testified that he did not have a copy of the contract that he signed as the Appellant kept all the documents. That he had taken some leave days, and was on leave when his employment was terminated. That he did not claim (over)time, but had outstanding leave days. That he could not tell the specific days when he worked overtime. That he had been paid for some overtime, but there were some days that were outstanding.
 12. The Appellant called one witness, Patrick Kilonzo (RW-1), who adopted his witness statement dated 28th April, 2023 as his testimony and produced in evidence the documents referred to in paragraph 7 of this Judgment. RW-1 further testified that the Respondent was being paid house allowance, and that his payslip and letter of confirmation of appointment attested to that fact. That the Respondent had taken (took) leave. That the Respondent deserted duty and was dismissed. That he was not unfairly terminated. It was RW-1's evidence that the Respondent was being paid overtime and service pay, and that he had a (loan) balance from Alarm Sacco and Security Group Welfare.



13. Cross-examined, RW-1 testified that the Respondent was not invited for any disciplinary hearing, and was issued with a summary dismissal letter. That the Respondent had been issued with a confirmation letter. That the Appellant had not paid any amount to the Sacco; though the Respondent had a loan balance. Re-examined, RW-1 testified that the Appellant did not issue the Respondent with a show cause letter because he had deserted duties and he could not be reached.
14. The trial court delivered its Judgment on 19th October, 2023 and made a finding that termination of the Respondent's employment by the Appellant was unfair, unreasonable and unlawful, both in substance and procedure. The trial court awarded the Respondent a sum of Kshs.767,102/=, made up as follows:-
 - a. One month salary in lieu of notice ...Kshs.31,808.36.
 - b. House allowance Kshs.133,595.20.
 - c. Compensation for unlawful terminationKshs.381,700.56.
 - d. Unpaid overtime Kshs.172,284.00.
 - e. Service pay Kshs.47,712.57.
15. Aggrieved by the said Judgment, the Appellant preferred the present appeal, and set forth five grounds of appeal, which I summarise as follows:-
 - a. That the Honourable Magistrate erred in law and in fact by holding that the Respondent was unfairly terminated from employment, yet he had been terminated after failing to report to work.
 - b. That the Honourable Magistrate erred in law and in fact by failing to consider the Appellant's evidence produced in court.
 - c. That the Honourable Magistrate erred in law and in fact by shifting the burden of proof from the Respondent to the Appellant, yet the Respondent had failed to establish a case against the Appellant on a balance of probability.
 - d. That the Honourable Magistrate erred in law and in fact by awarding the Respondent Kshs.767,102/= (as set out in paragraph – of this Judgment).
 - e. That the trial court erred in law and in fact by failing to address the Appellant's Counter-claim in its Judgment, yet the same had been pleaded by the Appellant.
16. The Appellant sought the following reliefs on appeal:-
 - a. That the appeal be allowed.
 - b. That the entire Judgment in CMCC ELR No. E226 of 2021 (Mombasa) delivered by the Hon. R. N. Akee (SRM) on 19th October, 2023 be set aside, and be substituted with an order dismissing the Respondent's suit with costs.
 - c. That Judgment be entered against the Respondent for payment of Kshs.126,131.74 being the outstanding loan arrears as pleaded in the Appellant's Counter-claim dated 28th February, 2022.
 - d. That costs of the appeal be borne by the Respondent.



17. I will handle the five grounds of appeal together. This is a first appeal, and the evidence presented before the trial court, which I have set out in this Judgment, is before this court for fresh evaluation. This Court, however, takes cognisance of the fact that it neither saw nor heard the witnesses first hand.
18. Having considered the pleadings filed in the trial court and the evidence presented thereon, issues that present for determination are as follows:-
 - a. Whether termination of the Respondent's employment by the Appellant was unfair.
 - b. Whether the Respondent was entitled to the reliefs sought in the primary suit, or any of them.
19. It was a common ground that the Respondent was employed by the Appellant vide a letter of confirmation of employment dated 24th August, 2018, and that his employment was terminated by the Appellant in December 2020. Both the Respondent and the Appellant (RW-1) testified that the Respondent was not issued with a termination notice, and that the Respondent was not accorded an opportunity to be heard before termination.
20. The Appellant (RW-1) testified that the Respondent absconded duty (absented himself from duty), and for that reason he was summarily dismissed. On the other hand, the Respondent pleaded that he was unlawfully terminated while on a 2 weeks' off. He however testified that he was on leave when his employment was terminated. He did not, however, tell the Court with precision when the off or leave commenced and when it was to terminate. He did not produce any document regarding the alleged off and/or leave.
21. The Respondent, however, pleaded and testified that on 28th November, 2020, he was made by the Appellant to sign a term contract which in effect unlawfully changed his status of employment from permanent employment as confirmed vide the letter of confirmation of employment (dated 24th August, 2018) to a (term) contract employment. That upon signing the contract on 28th November, 2020, he was given a two weeks' off.
22. Although the Appellant denied having made the Respondent to sign a contract that effectively changed the Respondent's employment status, the summary dismissal letter produced in evidence by the Respondent (RW-1), materially contradicted that position. The said summary dismissal letter, dated 11th December, 2020 and addressed to the Respondent, states in part:-

“Further to our term contract letter ref No. SGA/MSA/511027/20 dated 12th November 2020 which you signed on 28th November 2020 for change of employment terms and you were supposed to report on duty the following day but you did not show up, since 1st December 2020 you have not resumed back your duties or communicate to the office and your whereabouts are unknown . . .

In view of the above, you have been summarily dismissed . . .”
23. It is to be noted that the Appellant did not produce in evidence the “Term Contract Letter dated 12th November 2020 and signed by the Respondent on 28th November 2020”, and that the Court was not told by the Appellant when the Term Contract commenced, and when it was set to terminate. In the absence of any evidence on the date of commencement of the said contract, and the term thereof, the Appellant's allegation that the Respondent absented himself from duty remains just that, an allegation. The Respondent testified that the Appellant kept all the documents upon the said signing.



24. On a balance of probability. I find and hold that termination of the Respondent's employment was not based on a valid reason. Section 43 of the [Employment Act](#) provides as follows:-
- “(1) In any claim arising out of a 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.”
25. Section 43(2) of the [Employment Act](#), 2007 provides as follows:-
- “(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.”
26. Section 45 (2)(a) of the [Employment Act](#) provides that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid.
27. Further, the Appellant did not adhere to the mandatory provisions of Section 41 of the [Employment Act](#), which sets out a mandatory fair procedure which must be adhered to by any employer who wishes to terminate an employee's employment on account of misconduct, poor performance or physical incapacity. It is to be noted that by dint of Section 44(4)(a) of the [Employment Act](#), absconding duty amounts to gross misconduct. Failure by the Appellant to adhere to the procedure set out in Section 41 of the Act rendered the termination procedurally unfair.
28. I find and hold that termination of the Respondent's employment by the Appellant was procedurally and substantively unfair; and uphold the trial Court's findings in that regard.
29. It was stated as follows in the case of Walter Ogal Anuro – vs – Teachers Service Commission [2013] eKLR:-
- “... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
30. On the second issue, and having made a finding that termination of the Respondent's employment was unfair, and having taken into account the manner in which the Respondent's employment was terminated, I award the Respondent the equivalent of seven months' salary being compensation for unfair termination of employment. It was a common ground that the Respondent's monthly salary at the time of termination of his employment was Kshs.31,808.36. The equivalent of seven months' salary is $Kshs.31,808.36 \times 7 = Kshs.222,658.52$, which I award to the Respondent. The award of Kshs.381,700.56 is hereby set aside.
31. The award of Kshs.31,808.36 being notice pay is upheld pursuant to Section 35(1)(c) of the [Employment Act](#).
32. The claim for leave pay was not proved, and was properly declined by the trial court. The Respondent testified that he had taken some leave days, and did not specify how many leave days were outstanding at the time of termination of his employment.
33. The claim for house allowance was not proved, and is declined. The payslip produced in evidence by the Respondent clearly indicated that the monthly salary paid to him was inclusive of house allowance. The award of Kshs.133,595.20 made by the trial court as house allowance is hereby set aside.



- 34. The claim alleged to be for term contract was not proved, and was properly declined by the trial court.
- 35. The claim for alleged unpaid overtime was not proved, and is declined. The Respondent did not specify the days on which he worked overtime. He even testified that he was not pursuing that claim. The award of Kshs.172,284/= made by the trial court as unpaid overtime is hereby set aside.
- 36. The award of Kshs.47,712.57 made by the trial court as service pay is hereby set aside. It is clear from the payslip exhibited in Court that the Respondent was a member of, and a contributor to the NSSF. By dint of Section 35(6)(d) of the Employment, 2007, the Respondent was disqualified from claiming service pay.
- 37. Regarding the Appellant’s Counter-claim, the Appellant pleaded that the Respondent had taken loans from Alarm Sacco and Security Group Sacco, which had not been fully serviced as at the time of the Respondent’s dismissal. The Appellant did not demonstrate that the said entities were part of the Appellant company, and did not allege that it was either the Respondent’s guarantor regarding the said loans or had in any way paid up the said loans on behalf of the Respondent. The Counter-claim was not proved, and is hereby dismissed with costs. The trial court fell into error by failing to address itself to the Appellant’s Counter-claim.
- 38. In sum, and having considered written submissions filed by Counsel for parties herein, Judgment is hereby entered for the Respondent against the Appellant as follows:-
 - a. Compensation for unfair termination of employment Kshs.222,658.52.
 - b. One month salary in lieu of notice Kshs.31,808.36.

Total = Kshs.254,466.88.
- 39. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
- 40. The Respondent is awarded interest on the awarded sum, to be calculated at court rates from the date of the trial Court’s Judgment.
- 41. Each party will bear its own costs of the appeal, but the Respondent is awarded costs of the primary suit and the Appellant’s Counter-claim which I have dismissed vide this Judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

