



**Riley Falcon Security Services Ltd v Mkuzi (Appeal E070 of 2023)
[2024] KEELRC 13218 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13218 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E070 OF 2023
AK NZEI, J
NOVEMBER 22, 2024**

BETWEEN
RILEY FALCON SECURITY SERVICES LTD APPELLANT
AND
WILSON KATANA MKUZI RESPONDENT

JUDGMENT

1. The Appellant herein was the Respondent (defendant) in Mombasa Chief Magistrate’s Court Employment Case No. 251 of 2021 whereby it had been sued by the Respondent herein vide a Memorandum of Claim dated 16th April, 2021 and filed in Court on 10th June, 2021; and subsequently amended on 22nd June, 2022. The Respondent had sought the following reliefs:-
 - a. A declaration that termination of the Respondent’s employment by the Appellant was wrongful, unlawful, illegal, unprocedural, unfair and/or irregular.
 - b. Underpayment Kshs.268,000/=.
 - c. Compensation for unlawful termination of employment at the rate of the Respondent’s annual salary Kshs.240,000/=.
 - d. Notice pay Kshs.20,000/=.
 - e. Service pay Kshs.50,000/=.
 - f. Unpaid leave Kshs.70,000/=.
 - g. Public holidays pay Kshs.73,333.30/=.
 - h. Overtime Kshs.1,641,500/=.
 - i. House allowance Kshs.201,000/=.



- j. Certificate of service.
 - k. Any other/further entitlement(s) and/or order(s) as the Court may deem fit and just to grant in the circumstances of the case.
 - l. Costs of the suit and interest.
2. The Respondent had pleaded:-
- a. that he had been employed by the Appellant as a security guard in January 2015 and had worked continuously and uninterrupted upto 29th July, 2020, earning an initial salary of Kshs.9,000/= and Kshs.16,000/= at the time of termination.
 - b. that the Respondent reported on duty as usual on or about 29th July, 2020, but was verbally terminated by the Appellant's authorised representative, was ordered out of the assigned place of work; and was not given a termination letter.
 - c. that the Respondent had not committed or done any wrong which could be constructed as the cause for his termination.
 - d. that prior to the termination, the Respondent had not been issued with any warning, termination notice, summons or charges, had not been called upon to show cause regarding any charges and had not been given an opportunity to defend himself.
 - e. that during his employment, the Respondent was underpaid to the tune of Kshs.4,000/= per month, was not registered with NHIF/NSSF, was not given weekly off-days, never took leave, never observed public holidays, worked overtime without compensation and was never paid house allowance.
 - f. That termination of the Respondent's employment lacked fairness and was malicious, unprocedural, abrupt and contravened the relevant
3. Documents filed alongside the Respondent's amended Memorandum of Claim included the Respondent's affidavit in verification of the claim, the Respondent's written witness statement dated 16th April, 2021 and a supplementary witness statement dated 22nd June, 2022; and a list of documents dated 16th April, 2021, listing 7 documents. The listed documents included copies of the Respondent's Identity Card, payslip for December 2015, payslips for February, March, May, June, July and August 2016, a show cause letter dated 4th August, 2020, disciplinary hearing letter dated 4th August, 2020, summary dismissal letter dated 24th August, 2020 and a demand letter dated 15th July, 2020.
4. The Appellant entered appearance and filed a Statement of Response dated 17th June, 2022; and subsequently an amended Statement of Response dated 15th August, 2022; denying the Respondent's claim. The Appellant further pleaded:-
- a. that the Respondent was employed by the Appellant in December 2017 on the basis of annual fixed term contracts, after having previously worked for the Appellant's sister company.
 - b. that the Respondent had been summarily dismissed for gross misconduct in the nature of carelessly and negligently performing his work; by failing to exercise vigilance as a security guard while working at Kenya Power and Lighting Company in Mbaraki and failing to detect a theft incident.
 - c. that the Respondent was put through a legally compliant disciplinary procedure which involved being asked to prepare a written statement, a show cause letter to which he responded



in writing, a written invitation to attend a disciplinary hearing in the company of a fellow employee, attendance at a formal disciplinary hearing and a summary dismissal letter with a right of appeal.

- d. that the Respondent's explanation was not satisfactory, and a decision was made to terminate him summarily, and a letter was issued.
 - e. that the Respondent did not appeal the summary dismissal decision.
5. The Appellant further pleaded:-
- a. that the Respondent was not underpaid, that his claims relate to a period when he was not employed by the Appellant, that any claims beyond 3 years counting backwards from 16th April, 2021 (the date of filing suit) are time-barred by virtue of Section 90 of the [Employment Act 2007](#).
 - b. that the claims relate to distinct annual fixed term contracts that were performed and closed. That all claims, save for the last year of work - the year starting from January 2020, are time-barred as "continuing breaches" of the law by virtue of Section 90 of the [Employment Act, 2007](#) because they were filed more than 12 months from the last dates of cessation of the breach, which should be the dates of expiration of each fixed term contract.
 - c. that the Respondent was not entitled to compensation, as he was not unfairly terminated.
 - d. that the Respondent had been terminated summarily, and that notice pay was not payable to him.
 - e. that the Respondent was not entitled to service pay, as he was a member of NSSF, and contributions had been deducted and remitted to NSSF.
 - f. that the Respondent had proceeded on leave and when he did not, payment in lieu had been made in cash.
 - g. that the Respondent had been paid whenever he worked on public holidays.
 - h. that any overtime worked had been paid for, and that there was no unpaid overtime.
 - i. that house allowance had been paid.
6. It was the Respondent's further pleading that termination of the Respondent's employment was both substantively and procedurally fair.
7. Documents filed alongside the Appellant's amended response to claim included a witness statement of Elijah Cheruiyot dated 3rd October, 2022, and an evenly dated list of documents listing 32 documents. The listed documents included a job application letter to the Appellant, the Respondent's employment contracts with Riley Services Limited dated December 2014 to December 2015, January 2015 to January 2016, February 2016 to February 2017, letter of end of contract dated 18th November, 2017, the Respondent's NSSF Membership Card, the Respondent's contracts with Riley Falcon Security Services Limited (the Appellant) dated December 2017 to December 2018, December 2018 to December 2019 and an end of contract and extension of contract letter dated 21st January, 2020, a leave application/encashment form for February 2020, a show cause letter dated 4th August, 2020 and the Respondent's response dated 4th August, 2020, letter dated 4th August, 2020 inviting the Respondent for a disciplinary hearing, disciplinary minutes and a summary dismissal letter, among other documents.



8. At the trial, the Respondent, being the Claimant in the primary suit, adopted his filed witness statement as his testimony. He also produced in evidence the documents referred in paragraph 3 of this Judgment. The Respondent further testified that he did not receive house allowance but NSSF and NHIF were deducted, that he worked from 5.00 am to 6.00 pm and overtime was not paid, that he did not take annual leave and was not paid in lieu.
9. The Respondent further testified that on 29th July, 2020, he went to work at 5.00 am and took over his duty. That he noticed that something had been stolen. That he alerted the incharge and requested that he conveys the same to the supervisor. That the supervisor visited, and that the following day the head guard and the Respondent's Branch Manager visited and the Respondent was told that he was not in employment. That he was given a show cause letter the following day.
10. The Respondent further testified that at the disciplinary hearing, he was given no chance to defend himself and that he was coerced to accept liability for the theft, and that his colleague who had accompanied him to the hearing was blocked from the proceedings. That termination followed thereafter. That he was initially terminated verbally and the dismissal letter was given later. That the Respondent was not informed of his right of appeal. That his payslips reflected payment of house allowance, but which was too little. That holiday pay and leave were also reflected.
11. The Appellant called one witness, Elijah Cheruiyot (RW-1), who adopted his filed witness statement as his testimony and produced in evidence the Appellant's documents referred to in paragraph 7 of this Judgment. Cross-examined, RW-1 testified:
 - a. that he visited the place of the theft after a report on theft was filed, that no report was made to the police and no criminal charges were preferred against the Respondent.
 - b. that he (RW-1) signed the Respondent's show cause and disciplinary hearing letters, and was also the chairman of the disciplinary (committee) session.
 - c. that the Respondent worked from 2015 to 2020, and that he took leave or was paid in lieu during that period.
 - d. that the Respondent's salary was consolidated and included house allowance.
 - e. that the Respondent did not avail a witness during the disciplinary hearing.
12. The trial court delivered its Judgment on 30th June, 2023, making a finding that the Appellant had acted lawfully in dismissing the Respondent summarily on account of negligence which amounted to gross misconduct. The Court, however, entered Judgment in favour of the Respondent as follows:-
 - a. Underpayment Kshs.164,952/=.
 - b. Public holidays Kshs.73,333.30/=.
 - c. House allowance Kshs.17,535.56/=.
 - d. Costs of the suit.
 - e. Interest at 14% from the date of filing suit.
13. Aggrieved by the said Judgment, the Appellant preferred the present appeal and set forth the following grounds of appeal:-
 - a. The learned Magistrate erred in law and fact in failing to appreciate and [to] apply the concept of continuing injury which completely barred the claims for underpayment, house



allowance and public holiday pay, save for the claims relating to the Respondent's last year of employment.

- b. The learned Magistrate erred in law and fact by holding that the Respondent had established a case to warrant payment of holiday pay.
 - c. The learned Magistrate erred in law and fact by holding that the Respondent had established a case to warrant payment of house allowance.
 - d. The learned Magistrate erred in law and fact by holding that the Respondent had established a case to warrant payment of underpayments.
 - e. The learned Magistrate erred in law and in fact in failing to give weight to, to fathom or to consider the Appellant's written submissions and authorities.
 - f. The learned Magistrate erred in law and in fact in holding that the Respondent's constant monthly basic pay was Kshs.6,970/= and a house allowance of Kshs.1,045/= [and] yet the evidence before him clearly showed that he was earning a basic pay of Kshs.15,111.94 and a house allowance of Kshs.2,271.29 at the time of termination, hence it was erroneous to base underpayment on Kshs.6,970/= and Kshs.1,045/=, which led to unsound conclusions.
 - g. The learned Magistrate erred in law and in fact in awarding costs and interest to the Respondent.
14. The Appellant sought the following reliefs on appeal:-
- a. That the appeal be allowed and the Judgment of the lower court be set aside in regard to the awards of underpayments, public holiday, house allowance costs and interest.
 - b. That suit against the Appellant in the lower court be dismissed in its entirety.
 - c. That costs of the appeal and of the lower court suit be borne by the Respondent.
15. This is a first appeal, and the evidence adduced in the trial court is before this court for fresh evaluation. This court, however, takes cognizance of the fact that it did not see or hear the witnesses first hand. As stated by the Court of Appeal in the case of Kenya Ports Authority – vs – Kuston (Kenya) Limited [2009] 2 EA 212:-
- “On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
16. I will handle the grounds of appeal set out in paragraph 13 of this Judgment together. In my view, issues that present for determination are as follows:-
- a. Whether termination of the Respondent's employment by the Appellant was lawful and fair.
 - b. Whether the Respondent was entitled to the reliefs sought in the trial Court.
17. On the first issue, for any termination of an employee's employment to pass the fairness test, the employer must demonstrate that the termination was on account of a valid reason and that the termination was effected in accordance with a fair procedure. Sections 43 and 45 of the [Employment Act](#) address the foregoing issues, while Section 41 of the Act sets out a mandatory procedure which



every employer contemplating termination of an employee's employment on account of misconduct, poor performance or physical incapacity must adhere to; if the contemplated termination is to achieve procedural fairness.

18. It was stated as follows in the case of *Walter Ogal Anuro – vs – Teachers Service Commission* [2013] eKLR:-

“ . . . For 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.”

19. In the present case, whereas the Appellant went into some detail in establishing procedural fairness in terminating the Respondent's employment, it did nothing, in my view, to establish the validity of the reason on account of which the Respondent's employment was terminated. The Appellant did not present any evidence to demonstrate that the alleged theft occurred under the Respondent's watch. The person from whom the Respondent took over duty on the date of the alleged theft was never named, and was not called as a witness. No handover report was produced in evidence, and the actual time and/or date of the alleged theft was never established. The Respondent testified that on reporting on duty on the material date, he noted that some things had been stolen, and immediately alerted the guard in charge, with a request that he notifies the supervisor.
20. From the pleadings filed and evidence adduced in the trial court, the Respondent never admitted the allegations of negligence levelled against him by the Appellant, and the Appellant never demonstrated the validity of those allegations/charges. Indeed, the alleged theft was never reported to the police, and no investigations were done on the matter, either by the police or internally by the Appellant.
21. The minutes taken at the disciplinary hearing and produced in evidence by the Appellant did not contain the Respondent's signature at the confirmation part/section of the minutes. What the Respondent allegedly told the disciplinary committee is recorded in report/reported form, and the statement/testimony of the Respondent at the disciplinary hearing was not recorded. Whereas the Respondent is alleged to have “pleaded guilty”, only a box in the typed “minutes” was ticked by an undisclosed person. The Respondent testified that his fellow employee who accompanied him to the disciplinary hearing was blocked from the proceedings. The Appellant did not rebut this evidence. The purported typed minutes do not show whether the Respondent was accompanied by either a fellow employee or a union official of his choice. The portion marked “employee's witnesses” in the minutes produced in the trial court by the Appellant had been left blank. For record purposes, the purported minutes appeared to be in some standard form.
22. The Respondent testified in court that he was coerced to admit wrong doing. There is nothing on record to show that the Respondent made representations at the disciplinary hearing, and that those representations were taken into account by the Appellant in making a decision to terminate the Respondent's employment. Section 41 of the *Employment Act* on procedural fairness was not adhered to by the Appellant.
23. I return a finding that termination of the Respondent's employment by the Appellant was procedurally and substantively unfair, and I set aside the trial Court's finding that the Appellant acted lawfully in terminating the Respondent's employment.
24. I will, however, not make any award of compensation for unlawful and/or unfair termination of employment in favour of the Respondent as the Respondent did not file a cross-appeal against the trial Court's Judgment.



25. On the second issue, evidence adduced in the trial court by the Appellant shows that the Appellant, Riley Falcon Security Services Limited, was incorporated on 1st September, 2006 vide Certificate No. 127938, and that the Respondent signed a fixed term 12 months employment contract with Riley Services Limited commencing from 26th December, 2014. That the Respondent subsequently signed another 12 months contract commencing 26th January, 2016, a third twelve months contract commencing 25th February, 2017 and a fourth 12 months contract commencing 30th December, 2017. Evidence on record further shows that on 18th November, 2017, Riley Services Limited wrote to the Respondent advising him that his employment with the said company would end on 25th November, 2017 and asking him to return all company property by close of business on 26th November, 2017. The letter also advised the Respondent on payment of earned leave and uniform refund.
26. Further, the evidence on record shows that on 3rd January, 2018, the Respondent signed a twelve months fixed term employment contract with Riley Falcon Security Services Limited (the Appellant), after submitting a job application letter to the said company on 26th December, 2018. The Respondent signed a second twelve months fixed term contract with the Appellant on 26th December, 2018, which was to terminate on 26th December, 2019. This contract was subsequently extended in writing by the Appellant upto 26th January, 2020. There is not shown to have been another fixed term contract between the Appellant and the Respondent.
27. According to the evidence on record, the Respondent was employed by the Appellant (Riley Falcon Security Services Limited) on two fixed term contracts (December 2017 to December 2018 and December 2018 to 26th January, 2020). Thereafter, no other fixed term contract was signed between the two, though the Respondent continued working for the Appellant and earning a salary monthly. The Appellant produced in evidence the Respondent's payslip indicating that the Respondent was earning a basic monthly salary of Kshs.15,141.94 and a house allowance of Kshs.2,271.29 at the time of termination. The Respondent did not dispute the validity or authenticity of the said payslip; and did not rebut the Appellant's evidence in that regard.
28. The Respondent could not, under any known law, claim from the Appellant the alleged dues, terminal or otherwise, which are shown to have accrued while he worked for a different company, Riley Services Limited. Any finding by the trial Court to the contrary was made in error, and is hereby set aside.
29. Regarding the two fixed term employment contracts between the Appellant and the Respondent, running from 30th December, 2017 to 30th December, 2018 and from December 2018 to 26th January, 2020 respectively, the Respondent did not, in my view, prove his claims against the Appellant on a balance of probability.
30. The claim for underpayment was not specifically pleaded against the Appellant regarding the period that the Respondent worked for the Appellant, and was not proved. The award of Kshs.164,952/= made by the trial court is hereby set aside.
31. The claim for service pay was not specifically pleaded and was not proved; and particularly taking into account the fact that the Respondent had served under fixed term contracts from December 2018 to 26th January, 2020. Did the Appellant breach any of the terms of those contracts or the law on payment of minimum wages, and to what extent." The Court was not told. That claim was properly disallowed by the trial court. Further, the Respondent admitted having been a contributor to NSSF. Section 35(1) 6(d) of the [Employment Act](#) disqualified him from making that claim.



32. The claim for house allowance was not proved. The Respondent is shown to have been earning a house allowance at the time of his termination, at the rate of Kshs.2,271.29. The award of Kshs.17,535.56 made by the trial court is hereby set aside.
33. The claim for overtime payment had not specifically been pleaded, and was not proved. The same was properly declined by the trial court.
34. The claim for public holidays worked had not been specifically pleaded, and was not proved against the Appellant. The Respondent admitted in evidence that he was being paid for public holidays worked. The award of Kshs.73,333.30/= is hereby set aside.
35. The order for issuance of a certificate of service is upheld, and the Appellant shall issue the Respondent with a certificate of service pursuant to Section 51(1) of the Employment Act. This shall be done within thirty days of this Judgment.
36. The order for payment of interest on awards which I have set aside herein is hereby set aside.
37. In view of the finding herein that termination of the Respondent's employment by the Appellant was unfair, the primary suit is, in the interest of Justice, send back to the trial court for assessment of compensation (for unfair termination of employment) payable to the Respondent by the Appellant. The assessment shall be done by a Magistrate at the Chief Magistrate's Court, Mombasa, other than Hon. T. A. Sitati.
38. Each party shall bear its own costs of the appeal, but costs of proceedings in the trial Court shall be paid to the Respondent upon assessment of the compensation herein ordered.

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

