



REPUBLIC OF KENYA



**Muyaka v SGA Security (Employment and Labour Relations Appeal
E019 of 2022) [2024] KEELRC 2837 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2837 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E019 OF 2022
MA ONYANGO, J
NOVEMBER 14, 2024**

BETWEEN

ALEX MUHOLELA MUYAKA APPELLANT

AND

SGA SECURITY RESPONDENT

((Being an appeal from the judgment and decree of Honourable E. Kigen (Senior Resident Magistrate) delivered on 18th March 2022 in Eldoret CMELRC NO. E004 of 2020))

JUDGMENT

1. The Appellant was the Claimant in Eldoret CMELR NO. EOO4 of 2020 in which he had sued the Respondent vide a Memorandum of Claim dated 23rd September 2020 alleging that he was unlawfully, unprocedurally and unfairly terminated from employment. He sought for the following reliefs:
 - a. A declaration that the termination of his employment is unlawful and illegal contrary to the prevailing employment laws and more specifically the *Employment Act* No. 11 of 2007.
 - b. Certificate of service
 - c. Payment as per paragraph 15 of the Memorandum of Claim particularised as;
 - a. One month pay in lieu of notice.....Kshs. 20,000
 - b. Salary for the 19 days worked in the month of August 2019.....Kshs. 12,600
 - c. Payment in lieu of 105 leave days earned @20,000 per year...Kshs. 100,000
 - d. Payment of Sacco contribution.....Kshs. 90,000
 - e. Maximum of 12 months compensation for wrongful termination.....Kshs. 240,000



- f. Severance pay at 15 days worked for every year.....Kshs. 1,050,000
 - g. Damages for unlawful termination
 - d. Any other relief that the court may deem fit to grant
- 2. The Respondent filed a Response to the Claim dated 30th October 2020 denying the averments in the Memorandum of Claim.
- 3. Upon hearing the parties, the Trial Magistrate Hon. E. Kigen, Senior Resident Magistrate in her judgment delivered on 18th March 2022 found that although due process was not followed in the termination of the Appellant, Respondent was justified in dismissing the Appellant. Consequently, the trial court awarded the Appellant one-month salary in lieu of notice, salary for the 9 days worked and a certificate of service.
- 4. The Appellant was aggrieved by the said judgment and instituted the instant appeal through a Memorandum of Appeal filed on 1st April 2022 on the following grounds:
 - i. The Learned Magistrate erred in law and in fact and misdirected herself in finding the appellant worked for 9 days instead of 19 days worked in the month of August 2019.
 - ii. The Learned Magistrate erred in law and in fact in awarding the appellant salary for 9 days worked in the month of August.
 - iii. The Learned Magistrate erred in law and in fact in failing to establish that the appellant was entitled to payment in lieu of 105 leave days earned at a sum of Kshs. 20,000/- per year.
 - iv. The Learned Magistrate erred in law and in fact in failing to award 12 months' compensation for wrongful termination.
 - v. The Learned Magistrate erred in fact and in law in failing to establish that the Appellant was entitled to severance pay for the years worked
 - vi. The Learned Magistrate erred in fact and in law to establish that despite issuing Kshs. 20,000 as one month pay in lieu of notice there was an unfair and unlawful termination.
 - vii. The learned magistrate erred in fact and in law in failing to award damages for unlawful termination.
 - viii. The Learned Magistrate erred in fact and in law in failing to address herself on pertinent legal and factual issues contained in the Appellant's final submissions thereby arriving at erroneous findings.
 - ix. The Learned Magistrate erred in law to properly appreciate and apply established principles in a claim for unfair and unlawful termination in the factual and legal circumstances presented before her for termination.
- 5. Consequently, the Appellant seeks the following orders:
 - a. The judgement/decree of the trial Court dated 18/03/2022 be reviewed and/or set aside.
 - b. The appellant be paid salary for the full 19 days worked in the month of August.
 - c. The appellant be paid in lieu of 105 leave days earned at Kshs. 20,000/= per year totaling to Kshs. 100,000/-.



- d. The appellant be given 12 months' compensation for wrongful termination at Kshs. 240,000/-.
 - e. The appellant be awarded severance pay at 15 days worked for every year at a total of Kshs. 1,050,000/-.
 - f. The appellant be compensated for unlawful termination.
 - g. The respondent do bear costs of this appeal.
6. The appeal was disposed of by way of written submissions. The Appellant filed his written submissions on 27th October 2023 while the Respondent's submissions were filed on 30th October 2023.

Analysis

7. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.
8. Vide his Memorandum of Claim dated 23rd September 2020, the Appellant averred he was employed by the Respondent as a dog handler on 8th August 2013 where he worked until the 19th August 2019 when his services were terminated on false allegations that were unknown to him. He stated that he was informed that a car battery was missing and told not to report on duty to allow for investigations to be carried out and was never asked to report back to work. That his service was constructively dismissed. The Appellant further averred that after waiting for a month, he visited the Respondent's office to inquire on the progress and when he would resume work but he was informed that communication would be sent to him from the Respondent's head office which he never received.
9. It was the Appellant's contention that the action of the Respondent in terminating his employment was unlawful, unprocedural and unfair as there was no valid reason given for the dismissal and further, that he was not given an opportunity to defend himself.
10. He also maintained that he never proceeded on leave during the course of his employment and also, that he was a member of the Respondent's Radio Guard Co-operative Society where he made monthly contributions which monies had yet to be released to him.
11. The Appellant sought payment of his terminal benefits which he particularized as hereunder:
 - a. One month pay in lieu of notice.....Kshs. 20,000
 - b. Salary for the 19 days worked in the month of August 2019.....Kshs. 12,600
 - c. Payment in lieu of 105 leave days earned @20,000 per year...Kshs. 100,000
 - d. Payment of sacco contribution.....Kshs. 90,000
 - e. Maximum of 12 months compensation for wrongful termination.....Kshs. 240,000
 - f. Severance pay at 15 days worked for every year.....Kshs. 1,050,000
 - g. Damages for unlawful termination
12. The Respondent, in its Response to Claim dated 30th October 2020, averred that it employed the Claimant on temporary assignments of no longer than 24 hours with an entitlement of wages at the end of each day vide an agreement executed between the parties dated 8th August 2013.



13. The Respondent further stated that on 10th August 2019, the Respondent's Eldoret Branch, Mr. Nzomo Muasya received a call from the in charge, Mabati Rolling Mills, Eldoret to the effect that a car battery had been stolen from Motor Vehicle Reg No. KZZ 494 pick-up parked at Mabati Rolling Mills and that the investigations carried out revealed that the aforementioned battery was stolen on the night of 24th /25th July 2019 when the Claimant and Boniface Onyango (deceased) were the guards on duty.
14. The Respondent avers that the Claimant was also captured about 10 meters from the CCTV camera and had full knowledge of what happened on the said night.
15. It was the Respondent's contention that the Claimant and Boniface Onyango were informed of the complaints levelled against them with procedural compliance by the Respondent. That Respondent's manager upon viewing the CCTV footage, asked the Claimant and the late Boniface Onyango to explain in writing the events of the nights of 24/25th July 2019.
16. The Respondent prayed for the Claimant's claim be dismissed with costs.

The Evidence adduced

17. At trial the Appellant testified as CW1 and averred that he was employed by the Respondent in June 2012 and that as at the time he left employment, he had worked for 8 years. The Appellant testified that he was called to record statements on the alleged stolen car battery nine days after the incident occurred and that the manager asked him to write a commitment letter but he declined to write the letter as he did not steal the battery. It was his testimony that he did not take annual leave during the period he worked. Further, that he was not issued with a termination letter prior to his dismissal from employment. He averred that he was wrongfully dismissed.
18. On being cross examined, the Claimant stated that his contract of employment was for every 24 hours hence he was not entitled to leave days. He also conceded that his Sacco dues had been settled and he had no claim over the same. He stated that the vehicle whose battery was stolen was packed in the compound that he was patrolling. The Appellant stated that he was suspended on 10th August, 2019 to pave way for further investigations and was called for a hearing. He stated that the law was not followed. He stated that the Respondent remitted deductions to the NHIF.
19. The Respondent called Patrick Nzomo Mwasia, its Operations Manager who testified as RW1. He adopted his witness statement recorded on 30th October 2020 as his evidence in chief and relied on the bundle of documents filed by the Respondent. RW1 stated that the Claimant was not terminated unlawfully but his employment was terminated after a car battery belonging to MRM where the Claimant was manning got lost on 10th August 2019. RW1 stated that he visited the site and was shown a CCTV footage that showed that at 3am, there was interference with the cameras on the rear side of the building. He stated that the Claimant was asked to write a statement and thereafter invited to a disciplinary hearing which he attended and defended himself.
20. On cross examination, the Respondent's witness stated that the Claimant was the Respondent's employee and that he worked for one shift between 6 am to 6 pm on a daily basis. He further stated that the Claimant was entitled to 4 days off in a month whenever he worked for a whole month. RW1 stated the Claimant admitted that he had been approached by two men at 3 am on the day the battery was stolen. He also reiterated that the Claimant was taken through a disciplinary hearing.



The Appeal

The Appellant's Submissions

21. In his submissions dated 27th October 2023 the Appellant framed the issues for determination to be:
 - i. Whether the Appellant was a permanent employee of the Respondent and entitled to the orders prayed
 - ii. Whether costs should be provided for
22. On the first issue, it was submitted that during trial, the Respondent in its defence maintained that the Appellant was employed on temporary assignments of no longer than 24 hours with entitlement to wages for days worked which would be paid in a lump sum at the end of the month. According to the Appellant, having served the Respondent since 8th August 2013, and having been issued with a pay slip, and further earning his salary on a monthly basis, he was no longer a casual employee.
23. In submitting that the Appellant was a permanent employee and not a casual employee as averred by the Respondent, the Appellant cited section 2 and 37 of the *Employment Act* to buttress the point that the terms of engagement of the Appellant indicated that the Appellant was a permanent employee. It was submitted for the Appellant that as a regular employee he was entitled to such terms and conditions as he would have been entitled to under section 37(2) of the *Employment Act*.
24. Regarding the second issue on whether costs should be provided for, the Appellant submitted that the Appeal is merited and should be allowed with costs to him.
25. Consequently, the Appellant urged the court to find merit in the Appeal and grant the prayers sought therein.

The Respondent's Submissions

26. The Respondent in its submissions dated 27th October 2023 framed the issues for determination from the grounds in the Memorandum of Appeal to be:
 - i. Whether the learned magistrate erred in awarding the Appellant pay for 9 days for the month of August 2019
 - ii. Whether the trial court erred in failing to award pay in lieu of leave days
 - iii. Whether the Appellant was entitled to compensation for unlawful termination as sought
 - iv. Whether the Honourable magistrate erred in declining to award severance pay
27. On the first issue, the Respondent submitted that the Appellant pleaded that he was entitled to pay for the 19 days he worked yet during cross-examination, he testified under oath that he worked for 9 days in August and not 19 days. According to the Respondent, the trial court in making the finding of the 9 days that the Appellant worked was guided by the testimony of the Appellant, the notification of suspension and the disciplinary proceedings. The Respondent therefore submitted that the trial court did not misdirect itself in finding that the Appellant worked for 9 days. While citing the case of Chase International Investment Corporation and Another v Laxman Keshra and 3 others [1978] eKLR, the Respondent submitted that to pay the Appellant for the 10 days he didn't work would constitute unjust enrichment.



28. On the second issue the Respondent submitted that in declining the prayer for leave pay as sought, the trial court was guided by the letter of temporary employment in making a finding that the Appellant was employed on a 24-hour contract basis and which was subject to renewal depending on availability of assignments. According to the Respondent, the Appellant was unable to tender pay slips for all those years he claims to have worked during hearing. The court was urged to affirm the trial court's findings that the Appellant was not entitled to leave pay as sought as section 28 of the *Employment Act* as read with regulation 10 of the Regulation of Wages (Protective Security Services) Order, 1998 on leave pay was not applicable to him.
29. On the issue whether the Appellant was entitled to compensation for unlawful termination as sought, it is the Respondent's submission that the trial court awarded the Appellant Kshs 20,000 as compensation having found that although the Respondent had demonstrated valid reasons for terminating the appellant's services, due process was not followed in the termination process. It is the Respondent's submission that the trial court guided by section 49 of the *Employment Act* exercised its discretion in determining what to award as compensation owing to the Respondent's failure to issue notice prior to termination from employment as it awarded Kshs 20,000 as one-month payment in lieu of notice and Kshs 5,400 being the salary for the 9 days he worked.
30. Lastly, on the issue whether the trial magistrate erred in declining to award severance pay, the Respondent submitted that from a perusal of the Appellant's Memorandum of Claim, the nature of dispute before the trial court was one for termination of employment and not a claim involving the appellant being declared redundant within the meaning of section 40 of the *Employment Act*. In this regard, the court was urged to affirm the decision of the trial court on this issue.
31. The Respondent urged the court to dismiss the Appellant's appeal with costs.

Determination

32. The court has considered the grounds of appeal as stated in the Memorandum of Appeal, the record of appeal and submissions by counsel for the parties. The issue that falls for my determination is whether the findings of the trial court are in conformity with the pleadings and evidence adduced before it.
33. The court proposes to condense and summarize the Grounds of Appeal as follows:
 - i. The terms of employment of the Appellant
 - ii. Whether the learned magistrate erred in failing to consider the validity of the reason for termination of the Appellant from employment
 - iii. Whether the learned magistrate erred in law and in fact in failing to award unpaid salary, leave dues and severance pay
 - iv. Whether the learned magistrate erred in law and in fact in failing to award damages for unlawful termination.
 - v. What orders should issue.
34. The Appellant in his testimony before the trial court stated that he was employed by the Respondent on 8th August 2013 and worked for the Respondent until August 2019 when his employment was terminated over the car battery incident. On the other hand, the Respondent averred that the Appellant was engaged on temporary assignments of not longer than 24 hours with an entitlement of wages at the end of each day.



35. The *Employment Act* defines a casual employee under Section 2 as an individual whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time. Section 37 of the *Employment Act* further provides for conversion of casual employment to regular contracts as follows:
- (1) Notwithstanding any provisions of this Act, where a casual employee
 - (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
 - (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more,the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
 - (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
 - (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
 - (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.
 - (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.
36. From the above provision, it follows that the Appellant herein having worked for the Respondent for a period of 6 years was no longer a casual employee. His engagement automatically converted from casual engagement to a term contract by operation of the law.
37. On ground 2 which relates to the question of whether or not the Respondent had valid reasons to terminate the Appellant from employment, Section 45 of the *Employment Act* requires that an employer proves that the reasons for termination are valid and fair. Further, Section 43(2) specifically states that 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.
38. This position was affirmed by the Court of Appeal in the case of *Reuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another* [2017] eKLR where the court



cited with approval the following excerpt from Halsbury's Laws of England, 4th Edition, Vol.16(1B) para 642: -

“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 response 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 it falls outside the band, it is unfair. In assessing an employer's action therefore, the Court is not expected to supplant its own decision with that of the employer. In other words, the Court does not ask what it would have done in the circumstances of the particular case; all the Court asks is whether overall, the employer acted responsibly and reasonably and if the answer to this question is in the affirmative, the Court should not interfere with the employer's decision”.

39. The Appellant's employment was terminated on allegations of negligence regarding the loss of a car battery at Mabati Rolling Mills where he was manning on the night of 25th July 2019. The Respondent in its defence averred that the CCTV footage in the premises where the incident is alleged to have occurred captured the Appellant at around 3am tying the dog to the rails of the stairs of the rear door and thereafter, the camera view started shaking which action according to the Respondent was sufficient proof that the camera position was changed using a piece timber which was captured. The Respondent further stated that when the Appellant was asked to write a statement regarding the incident, he admitted to aiding in the theft of the car battery and pleaded to be pardoned.
40. I have analyzed the Appellant's handwritten statement dated 10th August 2019 and note that the Appellant in that letter admitted to allowing the two strangers take the subject battery. In his statement, the Appellant stated that his colleague, Mr. Boniface told him that the two men had been sent to check on the vehicle as it was on sale and that they wanted a battery to go jumpstart another vehicle.
41. I will not comment on the CCTV footage referred to in this case as it was not produced in court to verify the alleged tampering with the camera during the time it is said the car battery was stolen. I am however satisfied that the Respondent proved on a balance of probability that the Appellant was negligent in the performance of his job by allowing the car battery to be taken away which battery was under his care.
42. Ground no. 3 relates to whether the learned magistrate erred in law and in fact in failing to award the Appellant unpaid salary, leave dues and severance pay. The Appellant has faulted the trial court for awarding him 9 days instead of 19 days' salary for the days he worked in August 2019. In his testimony before the trial court, the Appellant stated that the incident happened on 24th July 2019 and he was called to record a statement over the incident after 9 days when he was immediately suspended.
43. A perusal of the letter of suspension reveals that the Appellant was required to report to work every day. The letter of suspension does not state that the suspension was to be without pay. The Respondent did not submit to the court the terms of service of its employees to prove that it provides for suspension.



44. Further, there is no letter of termination of employment issued to the Appellant which can help determine the exact date when his employment was terminated or the reasons for termination.
45. I find that the trial court erred in finding that the Appellant was entitled to salary for only 9 days. He is entitled to pay until the date his employment was terminated. I award him salary up to the day of termination which according to him was 19 days.
46. Regarding the issue of unpaid leave, the Appellant in his Memorandum of Claim sought for Kshs. 100,000 as unpaid leave dues. The trial court in its judgment declined to award the Appellant this prayer on the basis that the Appellant had not proved that he had been engaged continuously for 12 months.
47. Section 28 of the *Employment Act* provides that an employee who has worked for a minimum of 2 months continuously is entitled to annual leave irrespective of the nature of the employment contract. From the evidence of the Appellant, he never took any leave during the course of his employment. Although the Respondent's witness in his testimony averred that the Appellant was entitled to 4 days off in a month, he did not tender any evidence to the effect that the Appellant had indeed utilized his leave days during the course of his employment. In any event the 4 days were off days that every employee is entitled to after working for 6 days. Noting that the Appellant worked for 6 years for the Respondent, he is entitled to the leave at the rate of 24 days a year as provided in the Regulation of Wages (Protective Security Services) Order as he was working in the security industry. I award him as prayed in his Memorandum of Claim even though he was entitled to 144 days.
48. On the prayer for severance pay, section 40(1)(g) of the *Employment Act*, 2007 provides that only employees separating with an employer on account of redundancy are entitled to severance pay. I agree with the trial court that the Appellant is not entitled to this prayer.
49. Regarding Ground 4 on whether the learned magistrate erred in law and in fact in failing to award damages for unlawful termination, The trial magistrate made a finding that due process was not followed in the termination of the Appellant, but no award was made as compensation for the unfair termination. Section 49 (4) of the *Employment Act* outlines the factors to be considered by the court in exercising its discretion while making awards of compensation for unfair dismissal. The Appellant had worked for the Respondent for 6 years as at the time his employment was terminated. What led to the termination of his employment was that he relied on what his colleague told him about the people who collected the motor vehicle battery. He was not guilty of any of the charges for which he was suspended and later dismissed other than negligence in not verifying his colleague's word.
50. Having considered the factors set out in section 49(4) (e) of the *Employment Act*, and specifically the fact that the Respondent did not issue a letter of termination, the length of service of the Appellant and the conditions under which he worked and the reason for termination of the Appellant's employment I award the Appellant 4 months' salary as compensation for unfair termination.
51. In the end, the judgment of the trial court is set aside and substituted with the following:
 - a. The Appellant is awarded leave dues at Kshs 100,000
 - b. The Appellant is awarded 4 months' salary as compensation for unfair termination in the sum of Kshs. 80,000.
 - c. The Appellant is awarded salary for 19 days worked in August, 2019 in the sum of Ksh.12,600.
52. The Appellant will have costs for both the appeal and the lower court.



53. Interest shall accrue on decretal sum from the date of judgment in the lower court

54. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON

THIS 14TH DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE

