



REPUBLIC OF KENYA



KENYA LAW
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**Riley Falcon Security Services Limited v Watako (Appeal E076 of 2024)
[2024] KEELRC 2795 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2795 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E076 OF 2024
M MBARŪ, J
NOVEMBER 14, 2024**

**BETWEEN
RILEY FALCON SECURITY SERVICES LIMITED APPELLANT
AND
RAJAB WESONGA WATAKO RESPONDENT**

*(Being an appeal from the judgment of Hon. Noelyne Akee delivered
on 25 March 2024 in Mombasa CM ELRC No. E659 of 2021)*

JUDGMENT

1. The appeal arises from the judgment delivered on 25 March 2024 in Mombasa CM ELRC No. E659 of 2021. The appellant is seeking the judgment be set aside and the claim dismissed with costs.
2. The background of the appeal is a claim filed by the respondent, Rajab Wesonga Watako, on the basis that he was employed by the appellant as a security guard on 6 April 2015 and assigned duties within Mombasa County, including Signon King'orani and Kenya Power premises along Nkrumah road. His wage was Ksh.25, 254.34 per month. He worked until 23 October 2020, when the respondent terminated his employment. He was summoned to the head office at Ratna Square by the branch manager, Mr Cheruiyot, who directed him to surrender all work tools because his services were no longer needed. There was no notice or reasons given or payment of terminal dues, and hence claimed the following;
 1. Notice pay Ksh.25,254.34;
 2. Unpaid salary for 23 days Ksh.19,366;
 3. Unpaid leave days for 5 years Ksh.88,410;
 4. 12 months compensation Ksh.303,052.08;



5. Unpaid overtime for one hour for 58 months Ksh.211,062;
 6. Unpaid NHIF for 58 months Ksh.29,000;
 7. Service pay for 5 years Ksh.63,135.85;
 8. Costs of the suit.
3. In reply, the respondent admitted that he was employed as a security guard. He was employed by another entity until July 2017, when the appellant issued him with an annual fixed-term contract starting from September 2017. Each fixed-term contract was distinct, and the respondent was required to apply for re-employment and be vetted for re-employment upon police clearance.
 4. The last contract was from 30 November 2019 to 30 November 2020. The respondent re-applied for employment but needed to be more successful. He was informed through a letter dated 20 November 2020 that his employment was terminated based on the contract with a fixed expiry date. The appellant was not obligated to explain why the fixed-term contract was not renewed. There was no obligation to renew employment. The monthly wage was Ksh.25, 245.34, and there was a fixed-term contract, so notice pay was not due as claimed. The respondent was paid for days worked, and the parties agreed that leave days would be encashed. Any overtime work was paid, which did not apply in this case. NHIF dues were remitted, and service pay was not due as the respondent was a member of NSSF. Employment is terminated as agreed by the parties, and no compensation is due.
 5. In the judgment of the learned magistrate delivered on 25 March 2024, the court held that there was an unfair termination of employment and awarded Ksh.100, 000 in compensation, unpaid NHIF Ksh.29, 000 and costs of the suit.
 6. Aggrieved, the appellant is seeking to have the judgment set aside on the grounds that the trial court erred in failing to determine that the respondent's monetary claims were against the wrong employer as opposed to claims against Riley Services Limited. The claims from June 2015 to June 2016 and July 2016 to June 2017 were time-barred under the 3-year limitation period provided under Section 90 of the *Employment Act*.
 7. The claims for June 2015 to June 2016, July 2016 to July 2017 and September 2017 to 25 September 2018 were time-barred under the 12-month limitation period provided under Section 90 of the *Employment Act*.
 8. Other grounds of appeal are that the trial court erred in finding that the respondent worked in December 2020 while his evidence was that he was on end-of-contract leave. The contract ended naturally; hence, no unlawful termination should arise. The termination notice was not necessary, and the compensation awarded was incorrect. The monthly wage was Ksh.13 527.81 plus a house allowance of Ksh. 2, 035.92 gross due Ksh.15, 608.73 as evidenced by the payment statements produced in evidence.
 9. The award of damages of Ksh. 100 000 was arbitrary and not due in this case, as the same should have been based on the due monthly wage. There were remittances to NHIF, and hence, they were not due to the respondent.
 10. Both parties attended court on 23 September 2024 and agreed to address the appeal through written submissions.



Only the respondent complied.

11. The respondent submitted that he was employed by the appellant in the year 2015, the letter of non-renewal of the contract is dated 20 December 2020, and there was the payment of the due wage. The payment slips are under Riley Falcon Security Services Limited, the appellant who was the employer. The letter terminating employment dated 30 November 2020 needs to be signed.
12. The respondent submitted that proving an employment term rests on the employer. In the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, the court held that under Section 47(5) of the *Employment Act*, the employee has the burden of proving the unlawfulness of the termination, and the employer has the burden of justifying the termination of employment. In this case, the respondent discharged his duty while the appellant failed to justify the reasons leading to the termination of employment.
13. In *Josephine Ndungu & Others v Plan International Inc.* [2019] eKLR, the court held that under Section 47(5) of the *Employment Act*, the legal burden of proving unfair termination of employment rests on the employer. The employer must provide evidence establishing the validity of the termination of employment in terms of Sections 43 and 45 of the Act, as held in *Muthaiga Country Club v KUDHEIHA Workers* [2017] eKLR.
14. The respondent was not issued a letter of non-renewal of the contract, as alleged by the appellant. The respondent still needs to receive the letter dated 20 December 2020, and it is an afterthought as the contract was due to end on 29 November 2020. Termination of employment was on 23 October 2020, which was not justified, and the trial court made a proper finding and award.

Determination

15. This is a first appeal. The court must review the entire record, re-assess, analyse, and make a conclusion. However, the trial court had the opportunity to hear the witnesses.
16. The respondent's case is that the appellant employed him from 6 April 2015 to 23 October 2020, when his employment was unfairly terminated.
17. The appellant's case is that the respondent was employed from September 2017 under distinct annual contracts, the last ending on 30 November 2020.
18. Part of the records filed by the appellant was the Certificate of Incorporation dated 1 September 2006.
19. The appellant also produced various contracts of the respondent;
The contract dated 31 June 2015 was issued by Riley Services Limited and ended on 25 June 2015. [Backdated]
The contract dated 26 July 2016 was issued by Riley Security Limited and ended on 25 July 2017.
Contract dated 26 September 2017 issued by the appellant and ending on 25 September 2018;
Contract dated 16 October 2018 issued by the appellant ending 26 October 2019;
The appellant issued the contract on 29 November 2019, which will be effective from 30 November 2019 to 30 November 2020.
20. Through a letter dated 22 November 2020, the appellant indicated to the respondent that the employment contract would end on 25 November 2020 and should return all company property on 26 November 2020. Leave earned will be paid together with your December salary. Should you



wish the management to reconsider your re-employment, please submit a written application letter for employment before the close of business on 26 November 2020.

21. On the record before the court and in the various employment contracts, the respondent's employment was regulated under written contracts. His employment under the appellant began on 26 September 2017.
22. A new contract was issued with effect from 16 October 2018.
23. The last contract was effective from 30 November 2019 to 30 November 2020.
24. Fixed-term contracts of employment are lawful and legitimate. In the case of *Kenya Plantation and Agricultural Workers Union v Bendor Estate Limited* [2019] KEELRC 1684 (KLR), the court held that a fixed-term contract starts and ends on its terms without any legitimate expectation of renewal. In the case of *Trocaire v Catherine Wambui Karuno* [2018] KECA 769 (KLR), the Court of Appeal held that;

Once a fixed term contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period. This much was appreciated by this Court in *Oshwal Academy (Nairobi) & another vs. Indu Vishwanath* [2015] eKLR ... in *Bernard Wanjohi Muriuki vs. Kirinyaga Water And Sanitation Company Limited & another* [2012] eKLR:-

In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination.

25. The employment relationship between the appellant and the respondent was regulated under written contracts with a start and end date. Such a relationship was with effect from 16 October to 26 September 2017 and before that, he was employed by a third party.
26. Under the provisions of Section 90 of the *Employment Act*, the respondent could only make claims going back to 3 years from the date of filing his claim on 23 September 2021. This takes him back to 20 September 2018. This is the period under the employment of the appellant and not the third party.
27. The trial court should have addressed each claim made under this perspective of Section 90 of the *Employment Act*.
28. The fact of employment termination on 23 October 2020 is not challenged in any material way. Such was at a time when the respondent had a running contract ending on 30 November 2020.
29. The appellant's case that they issued the respondent with notice of the end of the contract dated 22 November 2020 and that he was required to re-apply for renewal of the contract is not based on correct fact. This is further demonstrated by the fact that under the notice dated 22 November 2020, the appellant directed the respondent to;

... your leave earned will be paid together with your December 2020 salary.



30. The subject contract where the respondent had earned his annual leave was to lapse on 30 November 2020. It had not been renewed to attract a wage for December 2020.
31. Further, the leave application form attached on page 61 [92] of the Record of Appeal and dated 26 November 2020 is a Staff Exit Clearance Form for the reasons that the respondent was on annual leave.
32. Stephen Abome Menza received the form but is not signed by the respondent as the applicant.
33. The leave application form for 26 days was to begin on 26 November 2020 to 25 December 2020. This was a period beyond the employment contract.
34. Records are manipulated to fit the purpose.
35. Where the respondent failed to attend duty after 23 October 2020, the date he noted his employment was terminated, there is no record that he served beyond that date.
36. To terminate employment without the due process of Section 41 or 44 of the *Employment Act* is unlawful. There is no justification for the appellant's termination of employment before the due date of 30 November 2020. The purported letter of renewal of contract dated 20 December 2020 is after the fact of unfair termination of employment.
37. The award of notice pay and compensation by the trial court cannot be faulted save, the basis of tabulating compensation due should be the monthly gross wage under Section 49(2) of the *Employment Act* as held by the Supreme Court in the case of Kenya Ports Authority v Munyao & 4 others [2023] KESC 112 (KLR) held that;

From the above analysis and the wording of section 49, it is clear to us that section 49 applies to only instances as have been set out under the Act; section 49 only applies where an employee is terminated; in any other instance the court is expected to exercise its discretion as granted by the Constitution, the Employment and *Labour Relations Act* and any other statutory provisions. In exercising such judicial discretion, a judge or magistrate bears the burden of accounting for their decision and in order to discharge this burden, the judge or magistrate ought to explain the basis of their decision.
38. The award of compensation is distinct from the award of general damages. Compensation is based on Section 49 of the *Employment Act* based on the gross wage while general damages only arise from breach and violation of *the constitution* or the law.
39. The trial court made a finding that there was an unfair termination of employment and should have tabulated the due compensation based on the last gross wage of Ksh.15, 385.15 and not made a general award.
40. The respondent was due to have his contract end on 30 November 2020. The contract was prematurely terminated on 23 October 2020. Had he been allowed a fair chance, he would have completed his term contract and applied for the next. For the unfair termination of employment without any good cause, there being no record to support any case of misconduct, the court finds an award of 3 months of gross wage justice.
41. On the gross wage of ksh.15, 385.15 x 3 total compensation is Ksh.46, 155.45
42. The other claims made should have been addressed on the merits.
43. On the claim for 23 days worked in October 2020, the respondent filed the payment statements for October and December 2020. These records are not challenged as not being authentic.



44. On the claim for unpaid leave for 5 years, leave pay is regulated under Section 28 of the *Employment Act*. Under the provisions of Section 28(4) of the Act, accrued leave days should be taken within 18 months. As outlined above, the provisions of Section 90, read together with Section 28(4) of the *Employment Act*, the respondent is only entitled to leave due for 33 days.
45. However, the record of the payment statement for December 2020 allocated leave pay at one-month gross wage. Such properly compensated the respondent for his time and annual leave due.
46. On the claim for unpaid overtime of one hour each day for 58 months, under the term contracts, these were continuing injuries which should have been addressed under the provisions of Section 90 of the Employment within 12 months after the cessation of the injury. From 23 October 2020, the respondent filed this claim before the trial court on 26 September 2021. He can only claim for the continuing injury going back to 25 September 2020 under his last contract of service as outlined by the Court of Appeal in the case of *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR) and the case of *Bichanga v Mount Kenya University* [2024] KEELRC 985 (KLR). Continuing injury and damage should be addressed within 12 months from the date of cessation.
47. In this regard, for the claim of overtime, the appellant did not submit any worksheets on how work hours were regulated as required under Section 10(6) and (7) of the *Employment Act*. In this case, for the last 12 months, the respondent is entitled to the claim of one hour worked overtime based on the last wage paid of Ksh.15,385.15 at Ksh.64.10 per hour x 30 x 52 = 100,002.50
48. On the claim for NHIF payments, these are due to the statutory body and not the employee.
49. On the claim for service pay, the respondent was employed as a security guard. The Regulation of Wages (Protective Security Services) Order, 1998 regulates security guards. Under these Wage Orders, at the end of employment, service pay is due over and above the payment and remittances of statutory dues. See *Yaa v SGA Security Solutions Limited (Employment and Labour Relations Appeal E002 of 2022)* [2022] KEELRC.
50. The service pay is due for the total number of years worked based on the gross wage last due to the employee. However, where employment is regulated under a fixed-term contract, each term starts a new work relationship as distinct from the previous one and where service pay is due, such should be addressed within the provisions of Section 90 of the *Employment Act*.
51. In this case, the respondent can only go back to 3 years. On the wage of Ksh.15, 385.15 for 15 days each year, the respondent is entitled to Ksh.23, 077.69 in service pay.
52. On costs, despite the appellant filing this appeal, there was no attendance to prosecute the appeal. The respondent is entitled to due costs.
53. Accordingly, the judgment of the trial court is hereby reviewed with the following awards;
 - a. Employment terminated unfairly;
 - b. Compensation ksh.46,155.45;
 - c. Notice pay ksh.15,385.15;
 - d. Overtime 100,002.50
 - e. Service pay ksh.23,077.69;
 - f. Costs as awarded by the lower court and costs of the appeal awarded to the respondent.



DELIVERED VIA TEAMS VIRTUAL PLATFORM THIS 14TH DAY OF NOVEMBER 2024.

M. MBARŪ

JUDGE

