



**SGA Security Solutions Limited v Mbai (Appeal E035 of 2024)
[2024] KEELRC 13480 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13480 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E035 OF 2024
M MBARÚ, J
DECEMBER 19, 2024**

BETWEEN

SGA SECURITY SOLUTIONS LIMITED APPELLANT

AND

BENARD ODHIAMBO MBAI RESPONDENT

*(Being an appeal from the judgment of Hon. L. Sindani delivered
on 22 February 2024 in Mombasa CMELRC No.923 of 2019)*

JUDGMENT

1. The appellant filed the Memorandum of Appeal on 19 March 2024, stating that following the judgment delivered on 22 February 2024 in Mombasa CMELRC No.923 of 2024, they are aggrieved and seek that the same be set aside with costs. The subject judgment dates are between 22 November 2024 and 22 February 2024.
2. The background to the appeal is a claim filed by the respondent before the trial court on the reasons that he was employed by Factory Guards (Msa) Limited on 12 June 2013 as a night security guard but was later absorbed by the appellant temporarily as a day security guard within Mombasa. How much was the wage Ksh.654 was paid monthly, working daily from 6 am to 6 pm on all public holidays and weekends. The claim was that while the respondent was at work, he was subjected to discriminatory treatment by the appellant in that his colleagues employed simultaneously were on permanent bass while he was left out. His payment terms differed; he was retained on a daily wage while the others were on a monthly wage. As a casual employee, the claimant lost work benefits.
3. The respondent claimed that on 12 May 2019, the appellant subjected him to harassment by subjecting him to a forceful alcohol test and then moved him from his Makupa workstation to Mariakani without notice or work facilities. The movement was done knowing that the appellant did not require the respondent's services. Earlier in October 2018, the appellant had refused to allocate the respondent



duties for one month and hence did not earn any income. The claim was that the respondent suffered emotionally and was forced to resign on 14 May 2019, which was an unfair termination of employment and hence claimed the following;

- a. Notice pay Ksh.18,285;
 - b. House allowance arrears from June 2013 to May 2019 Ksh.180,000;
 - c. Overtime June 2013 to May 2019 Ksh.1,292,496;
 - d. Refund of union dues deducted Ksh.13,140;
 - e. Leave allowance Ksh.82,404;
 - f. Travelling allowance Kshs.6,650;
 - g. 12 months compensation Ksh.219,420;
 - h. Costs of the suit.
4. In reply, the appellant admitted that they employed the respondent temporarily as a day guard within Mombasa but denied that he was not on a daily wage of Ksh.654 or worked from 6 am to 6 pm daily. As alleged, there was no discriminatory treatment or unfair labour practices against the respondent. The claim that on 12 May 2019, the respondent was subjected to harassment and forceful alcohol test is not correct. However, the respondent tended not to follow instructions given by his supervisors and remained rude to his colleagues. On 11 May 2019, the appellant, though Austice Mariga, instructed Enock Omariba to direct the claimant to report to Gapco terminal, Makande, on 12 May 2019 to relieve another guard. Omariba went to the site with Makori and reported that the respondent had not reported. Upon enquiry at Makupa Transit Shade, they were told that the claimant had refused the movement. Makori offered the respondent bus fare to report to Gapco, but he refused and removed his uniform. Omariba and Makori realized the respondent was drunk, and when he was requested to take an alcohol test, he became violent. He was advised to go home and return the next day. This was not the first time he had reported to work drunk. In June 2017, the respondent had been suspended from duty due to drunkenness.
5. The appellant stated that the respondent did not report to work on 13 May 2019 as directed and only returned on 14 May 2019 with a letter of resignation. He claimed that there was constructive dismissal. He wrote another letter on 17 May 2019, claiming he had been allocated work yet was off duty. The appellant suspended him for 7 days for absconding work from 21 May 2019. On 27 May 2019, the appellant invited the respondent for a disciplinary hearing on 4 June 2019. The respondent waived his right to be represented at the hearing and was given up to 12 June 2019 to indicate if he was still interested in working for the appellant. However, he opted to rely on his resignation notice and wrote a letter dated 17 June 2019 asking for his terminal dues, which were accepted on 27 June 2019. The claims made for compensation, overtime, house allowances and other dues are without merit and should be dismissed. The appellant paid the respondent Ksh.50, 000 on 30 August 2019 in terminal dues.
6. The trial court heard the parties and, in the judgment delivered on 22 February 2024, held that there was constructive dismissal of the respondent when the appellant forced the respondent to take an alcohol test on 12 May 2019 and then transferred him to Mariakani without facilitation and then refused to assign him with duties. The court awarded the respondent the following;
- a. Notice pay Ksh.18,285;



- b. House allowance Ksh.180,000;
 - c. Overtime Ksh.1,292,496;
 - d. Refund of union deduction Ksh.13,140;
 - e. Leave pay Ksh.82,404;
 - f. Certificate of services;
 - g. Costs.
7. Aggrieved, the appellant's case is that the trial court erred in law and fact in holding that there was an unfair termination of employment, whereas the respondent resigned. There was a disciplinary hearing upon which the respondent opted to resign. The award of notice pay and compensation was in error. The respondent would be paid monthly, including a house allowance, which should not have been awarded at ksh. 180,000. The overtime awarded was without proof that the union dues went to the claimant's union. The respondent admitted to taking annual leave; hence, the awarded Ksh.82, 404 was in error. The appeal should be allowed, and the judgment should be set aside.
8. Both parties attended and agreed to address the appeal through written submissions.
9. The appellant submitted that upon the respondent's resignation, no notice of pay or compensation was due, and this should be set aside. The respondent resigned instead of waiting for the disciplinary hearing to conclude. The appellant adhered to Sections 41 and 45 of the *Employment Act*. The respondent was called for a disciplinary hearing for various misconducts, including being found drunk at work and absconding on duty, but he opted to resign. Such gross misconduct warranted summary dismissal, but the appellant followed due process.
10. The appellant paid the respondent Ksh.50, 000 in terminal dues.
11. The wage paid was inclusive of the house allowance, and the overtime work was not proved. The respondent was a member of a trade union, and his dues were remitted; a payment statement was issued to confirm the same. He never complained during the employment period.
12. The respondent testified and confirmed that he took his annual leave. The leave pay award was in error.
13. The respondent submitted that he was forced to take an alcohol test on 12 May 2019 and then directed to report to Mariakani station. However, he was forcefully forced out when he raised concern that he had no letter of dispatch or transport allowance. The forced alcohol test was both degrading and dehumanizing and caused the claimant to suffer indignity under Article 28 of *the Constitution*. This forced the claimant to resign through a notice dated 14 May 2019. In the case of *John Rioba Maugo v Riley Falcon Security Services Limited* [2016] eKLR, the court held that drunkenness is a very shaky ground on which to find liability for purposes of summary dismissal. The claim by the appellant that the respondent was drunk while at work was without evidence. This was forced examination and arbitrary, leading to constructive dismissal.
14. The respondent submitted that being directed to report to Mariakani without providing work facilities and transport was unfair and harassing. Further refusal to be allocated work subjected the respondent to degrading treatment. This forced him to tender his resignation on 14 May 2019. He gave one month's notice, but pending such notice, the respondent refused to allocate his work.



15. The respondent submitted that he was granted the opportunity to serve in another department. However, he chose to maintain his decision of resignation since he had undergone unfair treatment and frustration at work, as reported by the letter dated 12 June 2019.
16. The respondent relied on the case of Jonathan Ogada Atiagaga v David Engineering Limited [2015] eKLR, in which the court held that constructive dismissal occurs when an employee is forced to resign because the employer has placed him under intolerable working conditions, as defined in the cases of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR and Mariana Onica & Another v Sky Aero Limited Cause No.1815 of 2014.
17. The award of compensation and notice pay was lawful and justified. Housing was not provided, and no allowance was paid. The respondent worked overtime without compensation, and the award by the trial court is justified.
18. The respondent was not unionized, and the union dues deducted were unjustified. The appellant did not file proof that the respondent was taking annual leave or issuing a Certificate of Service.

Determination

19. This is a first appeal. The court is required to re-assess and review the record and make its conclusions. However, take into account that the trial court had the opportunity to hear the evidence.
20. Through notice dated 14 May 2019, the respondent resigned from his employment with the appellant on the basis that he had been working in a hostile and difficult environment. He noted that on 12 May 2019, he reported to work at Makupa Shed Terminal but the operations manager sent him to Mariakani Transport from Mombasa to Mariakani. He noted that he was a resident in Mtongwe and needed Ksh.600 for bus fare yet his net salary was Ksh. 11, 000. The respondent also noted that he had applied for the advertised jobs but was denied the chance because of his ethnic background.
21. The respondent asked to be issued his certificate of service and overtime for 6 years, house allowances, service pay and damages.
22. On 17 May 2019, the respondent wrote to the appellant and referred to his notice of 14 May 2019. He resigned due to being placed in a hostile working environment. He had reported to Mariakani as directed but was not allocated work.
23. On 21 May 2019, the appellant suspended the respondent for being found drunk at work and refusing to report to work.
24. On 23 May 2019, the respondent acknowledged the suspension but noted that he had tendered his resignation notice on 14 May 2019 the suspension was legally and procedurally fatal.
25. The appellant invited the respondent to a disciplinary hearing on 24 May 2019 but he failed to attend. Through notice dated 27 May 2019, the appellant invited the respondent to another disciplinary hearing on 4 June 2019. The respondent replied and noted that he would attend and did not require any shop steward to help him.
26. The respondent filed the disciplinary minutes held on 4 June 2019. The conclusion was that the evidence tabled against the respondent was weak and could not sustain a sanction. He was offered to work in another department and allowed to respond by 12 June 2019.



27. Indeed, the respondent responded and noted that;
- ... I have done soul searching on the matter and my stand is still the same, that is, my notice of forced resignation dated 14 May 2019 still stand. ...
28. Constructive dismissal is as defined in the case of *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR outlined by the respondent in his written submissions. The employee is forced to terminate employment due to the intolerable conditions he is placed.
29. In this case, the respondent as the employee is noted to have been found drunk at work. He was tested at Vivo Energy where he was subjected to alcho blow.
30. The test results were not produced.
31. The respondent admitted that he was moved from his work site at Makupa to Mariakani on 12 May 2019 but was not facilitated with transport. He later reported to Mariakani on 14 May 2019 but was not allocated any duties.
32. On 21 May 2019, the appellant suspended the respondent for being found drunk while at work and absenting himself from work. He was allowed to attend a disciplinary hearing and defend himself.
33. Whereas the appellant was keen to take the respondent through due process, the respondent had made up his mind. He did not need the job any more. Indeed, despite the disciplinary hearing not finding any incriminating evidence against him and offering him to work in a different department, the respondent remained adamant. He could not work with the appellant.
34. Whereas constructive dismissal results from a hostile work environment, where the employee is invited to work in a different department to change his work environment but remains is adamant that he has to terminate his employment, the employer must release such an employee. Continued employment of the respondent in the given circumstances of his case would have resulted in servitude. Despite the disciplinary hearing being conducted to hear him on the merits and allow him a change of department for continued service, he opted to confirm his resignation.
35. The respondent had a pre-determined mind. His option was single. He had been subjected to constructive dismissal;
- ... I have done soul searching on the matter and my stand is still the same, that is, my notice of forced resignation dated 14 May 2019 still stand. ...
36. Nothing was going to change him.
37. The respondent cannot benefit from the concept of constructive dismissal. He stuck to his position and frustrated any efforts to return him to work.
38. Compensation and notice pay are not available.
39. In any event, before the trial court awarded 5 months' compensation, the requirements of Section 45(5) of the *Employment Act* were to consider the work records. The appellant submitted a litany of misconduct cases in which the respondent was issued warnings, suspensions, surcharges, and theft. These records must have a bearing. The respondent had a chequered record, and his resignation was meant to avoid the obvious, summary dismissal.
40. On the claim for house allowance, part of the documents filed by the respondent before the trial court are his payment statements.



41. In April 2019 he was paid Ksh.18, 205 as gross wage.
March 2019 he was paid Ksh.15, 672.
December 2018 he was paid Ksh.12, 748.77;
June 2018 he was paid Ksh.17, 414.32;
March 2018 he was paid ksh.14, 926.56.
42. The wages paid are gross and oscillate between 14,000 to 18,000 each month.
43. A security guard working in Mombasa in the year 2019 was entitled to a minimum wage of Ksh.13, 572.90 per month. Additional house allowance of 15% is Ksh.2, 035 is gross Ksh.15, 607.80
44. On this basis, a general assessment of the claims for house allowances due should have been particularized based on the records. The respondent produced the payment statements to prove that he was deducted trade union dues unfairly. He was in possession of these records for analysis of the claimed house allowances.
45. For the month of April 2019 addressed above, no house allowance is due.
46. The last month assessed in March 2018, no house allowance is due.
47. Cumulatively, the claims for house allowances are not justified.
48. On the claim for overtime, the evidence that work was from 6 am to 6 pm is not challenged in any material way. The appellant did not file any worksheets to address this matter.
49. Once overtime was claimed, the appellant had the burden of proving that there was no such work. However, the claim for overtime worked each day continuously and without a break for 8 years is not humanly possible.
50. The records submitted are in their nature that the claimant was not at work each day.
On 30 September 2013, he was suspended from duty;
On 5 February 2015, he was on suspension;
On 21 May 2019, he was on suspension.
51. The claim for overtime accrued being a continuing injury, the respondent should have addressed such matter within 12 months from the date such injury ceased as held in the case of *OI Pejeta Ranching Limited v David Wanjau Muhoro* [2017] KECA 329 (KLR) and *Michira & 41 others v Aegis Kenya Ltd t/a Leopard Beach Hotel* [2023] KEELRC 2551 (KLR).
52. In this case, for the last year of service, at the last wage of ksh.18, 205 per month, for the overtime of 4 hours each day, the respondent is entitled to Ksh.63, 110.67 in overtime pay.
53. On the claim for refund of union dues, the security sector within which the appellant operates is regulated within tripartite. Where there exists a trade union with a Recognition Agreement and a CBA, the details exist for the respondent to follow up. The rationale is that an employer is under the law bound to deduct and remit union dues within 30 days of deduction under Section 50 of the [*Labour Relations Act*](#).
54. The award of the deducted union dues was in error.



55. The respondent filed a copy of his Certificate of Service. The orders directing this be issued are not necessary.
56. On the whole, the appeal is with merit save for the due overtime payments awarded at ksh.63,110.67 which shall be paid within 30 days after which the same shall accrue with costs and interests at court rates from the date of the judgment.

Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

