



**Fidelity Security Limited v Anene (Appeal E199 of 2022)  
[2023] KEELRC 1512 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1512 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E199 OF 2022**

**B ONGAYA, J  
JUNE 16, 2023**

**BETWEEN**

**FIDELITY SECURITY LIMITED ..... APPELLANT**

**AND**

**HARRISON NZABANYI ANENE ..... RESPONDENT**

*(Being an appeal against the entire judgment and decree of Hon. Senior Resident Magistrate  
S. N. Muchungi delivered on 21.10.2022 in Milimani CMELC No. E130 OF 2022)*

**JUDGMENT**

1. The appellant filed the memorandum of appeal dated November 17, 2022 through CM Advocates LLP. The appellant stated that the learned trial Senior Resident Magistrate erred in law and fact as follows:
  - a) By finding that the appellant should pay a house allowance amounting to Kshs 816, 868.80 without considering the Sarova Taita Hills letter proving the claimant was given accommodation and provided meals at the respondent's behest.
  - b) By failing to find that the claimant was lawfully dismissed through summary dismissal.
  - c) In issuing awards in favour of the respondent without considering his income as the awards especially house allowance was not in alignment with his level of income.
  - d) In finding that the claimant was wrongfully and unfairly terminated.
  - e) In awarding excessive compensation of 12 months' salary.
  - f) In awarding huge interest.
  - g) In ignoring the submissions by the respondent and authorities by superior courts.



- h) In failing to indicate the reason or reasons to justify why she decided to make a maximum award.
  - i) In exercising judicial discretion capriciously or whimsically in the award or compensation hence arriving at an erroneous decision both factually and legally.
  - j) In delivering a wholly erroneous judgment in law and fact, contrary to equity and judicial precedents.
2. The appellant prayed for orders as follows:
- a) The appeal be allowed.
  - b) The entire judgment delivered by Hon SN Muchungi, SRM, on October 21, 2022 in CMELRC E130 of 2022 be dismissed with costs.
  - c) The respondent to bear costs of the appeal and CMELRC E130 of 2022 on a full indemnity basis.
3. The respondent alleged as follows in the statement of claim. He was employed by the appellant as a guard on December 6, 1997 at monthly salary of Kshs 6, 000.00 and as at termination the salary was Kshs 20, 628.00. The contract was oral and the respondent was deployed to Taita Hills Lodge between 2009 to May 4, 2020 when he was recalled back to Nairobi. Throughout the service he was not provided housing as envisaged in section 31 of the *Employment Act, 2007*. Further, for 22 years of service he was not given annual leave or paid in lieu of such leave as envisaged in section 28 of the Act. He worked on all public holidays without due compensation. He reported at work at 6.00am and left at 6.00pm. On May 4, 2020 he was recalled back to Nairobi. Thereafter he was put on leave with a promise to be recalled back. On December 14, 2020 he had not been recalled back and he checked whereupon, he was advised to report at the respondent's head office on December 16, 2020. When he reported on December 16, 2020 he was issued a letter of summary dismissal dated July 8, 2020. The reason given in the letter was that the respondent had failed to report to the office for further deployment after his annual leave since July 1, 2020 as expected. The letter stated the respondent had been absent from work without lawful excuse. He was given a right of appeal within 7 days after receipt of the letter. It is his case that prior to the dismissal he was not given a letter to show cause and there was no disciplinary hearing per section 45 of the Act. He was not a member of NSSF and he was not paid gratuity. He was not paid terminal dues. A demand letter dated September 15, 2021 was issued. The appellant refused to compromise. The respondent claimed against the appellant as follows:
- a) One-month salary in lieu of termination notice Kshs 20, 628.00.
  - b) 22 years' leave at 21 days per year Kshs 366, 543.69.
  - c) House allowance  $15\% \times 20, 628 \times 22 \times 12 =$  Kshs 819, 007.20.
  - d) Service gratuity for 22 years at 18 days per year = Kshs 341, 180.00.
  - e) Unpaid public holidays 11 days per year  $\times 22 \times 11/27 =$  Kshs 369, 776.00.
  - f) Overtime  $4 \times 6 \times 4 \times 12 \times 22 \times 33.06 =$  Kshs 837, 872.64.
  - g) 12-months compensation for unfair termination =  $12 \times 20, 628 =$  Kshs 247,536.00.
  - h) Certificate of service.
4. The respondent prayed for judgment against the appellant for:



- a) A declaration that the respondent's termination and refusal or neglect or failure to pay the respondent's dues is unfair and unlawful.
  - b) The respondent be paid his dues and salary arrears as claimed totalling Kshs 3, 002, 543.84.
  - c) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
  - d) The appellant to pay the costs of the claim.
  - e) Interest on the above at court rates.
  - f) Certificate of service to issue per section 51 of the Act.
5. The appellant filed the memorandum of response dated February 17, 2022 through Kisilu, Wandati & Company Advocates. The appellant pleaded as follows. It was admitted that the respondent was employed from December 1997 to December 16, 2020 when he was summarily dismissed from work for absenteeism without lawful excuse. The respondent's case was that it lost Sarova Taita Hills as a client due to effects of Covid 19 Pandemic on hospitality industry. The respondent was recalled to Nairobi for redeployment. On July 1, 2020 the respondent went for annual leave for a month and he was expected back for redeployment but he never reported back until December 14, 2021. The respondent was given a hearing. He failed to exculpate. He was summarily dismissed. The termination was not unfair or unlawful. The demand letter was never served upon the appellant. The respondent was not entitled to the claims and prayers made. The appellant prayed the suit be dismissed with costs.
  6. The respondent filed a memorandum of reply to the memorandum of response. The respondent admitted that the appellant lost Sarova Taita Hills as a client due to effects of Covid 19 Pandemic on hospitality industry and, the respondent was recalled to Nairobi for redeployment. He repeated the claims made in his statement of claim. The respondent stated that on July 1, 2020 he was put on indefinite leave with the promise he would be recalled back. He checked on December 14, 2020 only to be issued with a summary dismissal letter. There was no due process of a notice and a hearing and stated that all his claims were justified.
  7. This is a first appeal. The role of the Court is to re-evaluate the evidence on record and arrive at findings one way or the other bearing in mind that it is the trial Court which had the benefit of taking the evidence.
  8. The 1<sup>st</sup> issue is whether the trial Court erred in finding that the termination was unfair. In finding that the termination was unfair, the trial Court considered that the letter of summary dismissal was dated July 8, 2020 whereas the purported disciplinary meeting was allegedly held on December 16, 2020. Further, the claimant's name was conspicuously missing in the minutes of the disciplinary hearing and there was no evidence that the respondent had attended the disciplinary hearing. The Court finds that the trial Court cannot be faulted at all. The dismissal was by letter dated July 8, 2020 long before the purported disciplinary meeting of December 16, 2020. The appellant appears not to have had alternative job for redeployment of the respondent in view of the Covid 19 situation. Instead of declaring the claimant redundant, the appellant fabricated absenteeism in a fake disciplinary process. The termination was unfair as the advanced reason was not genuine and fair per section 43 and 45 of the *Employment Act, 2007*. The procedure adopted was unfair per test in section 45 of the Act. It was unfair both in procedure and merit.
  9. To answer the 2<sup>nd</sup> issue, the trial Court did not err in awarding one-month salary in lieu of termination notice Kshs 20, 628.00. On compensation 12 months' salaries the trial Court stated, "In respect of compensation for unlawful dismissal. I have taken into account the long period the claimant served



the respondent his age which is now 67 years and the possibilities of him securing another job and the circumstances and manner in which he was dismissed and I find that he deserves the maximum compensation. I thus award him Kshs 247, 536/-.” The Court finds that the trial Court properly considered the factors in section 49 of the *Employment Act, 2007*. Indeed, the Court has found that parties were in agreement that Covid 19 situation had led to the predicament that the respondent could not have continued in employment. Had the appellant declared a redundancy, and which was actually the circumstance, then the respondent would have been entitled to severance pay per section 40 of the Act and other benefits thereunder so that an award of 12 months’ compensation was not unfair. It is not true, as submitted for the appellant, that the trial Court simply plucked the maximum award from the air. Capricious exercise of discretion has not been established in that regard.

10. To answer the 3<sup>rd</sup> issue, the Court finds for the appellant that the trial Court erred in finding that the respondent was entitled to Kshs 816, 868.80 in house allowance. As submitted for the appellant, once the appellant produced a letter showing that the respondent was housed by the Hotel, the respondent thereby became disentitled to house allowance in terms of section 31 of the Act. The appellant had clearly made arrangements for the client, the Hotel, to provide the respondent with housing accommodation. That was a clear bargain. As urged for the appellant, in any event, the respondent never demonstrated that he had rented accommodation and paid for rents and food. The appellant was also correct in submitting that in any event, the last monthly salary would be unjust base to calculate the house allowance due. That ground of appeal will succeed. It is also true that the claim was time barred under section 90 of the Act as it was a continuing injury whose time of limitation was 12 months next after cessation thereof. In particular, between the date of termination (when the injury ceased) and the date of filing the suit, 12-months had already lapsed making the claim time barred.
11. The 4<sup>th</sup> issue is whether the trial Court erred in awarding the respondent gratuity Kshs 314, 180.00. The trial Court made the award in reliance upon Regulation 17 of the *Regulation of Wages (Protective Security Services) Order, 1998* section 17 which provides that after 5 years of service with an employer, the employee shall be entitled to 18 days’ pay for every completed year of service by way of gratuity based on the employee’s wage at the time of termination of service. The appellant opposed the award on account that under sub regulation 17(2), an employee who is summarily dismissed for lawful cause or terminates his services for any reason other than certified ill-health or retirement age shall not be entitled to a gratuity. The Court has found that the summary dismissal was unfair and unlawful. Thus the submission as made for the appellant will collapse and the award upheld.
12. The Court has considered the parties’ margins of success in the instant appeal and each will bear own costs of the appeal.

In conclusion the appeal is hereby determined with orders:

- a. The trial Court’s judgment and decree is upheld except to the extent that the award of Kshs 816, 868.80 house allowance is set aside.
- b. Each party to bear own costs of the appeal.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 16TH JUNE, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

