



REPUBLIC OF KENYA



KENYA LAW
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**Mutunga v Radar Limited (Appeal E002 of 2023)
[2023] KEELRC 2039 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2039 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E002 OF 2023**

**M MBARŪ, J
JULY 27, 2023**

BETWEEN

MWINYI KOMBO MUTUNGA APPELLANT

AND

RADAR LIMITED RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate's Court at Kaloleni, Hon. R. M. Amwayi delivered on 14 December 2022 in Kaloleni CMELRC No.E002 of 2021)

JUDGMENT

1. The appeal herein arose from the judgment delivered on 14 December 2022 in Kaloleni CMELRC No E002 of 2021 with dismissal of the appellant's case with costs. The appellant had filed his Memorandum of claim on the grounds that he had been employed by the respondent as a security guard on 5 January 2016 earning a basic wage of Kshs 17,966 per month but on 31 October 2018 his employment was unfairly terminated without the due process and hence he claimed payment of terminal dues;
 - a. One months notice pay Kshs 17,966;
 - b. Unpaid leave days for 3 years for 21 days;
 - c. Unpaid public holidays for 3 year;
 - d. House allowance at Kshs 34,884;
 - e. Severance pay for 2 full years Kshs 21,796.50;
 - f. Compensation for unfair termination of employment.



2. In response, the respondents case was that the appellant's wages paid were guided under the [*Regulation of Wages \(General\) \(Amendment\) Orders*](#) and which was inclusive of house allowance. There was termination of employment and the reasons given in the notice issued was that the appellant would be paid in lieu of notice but there was no work during public holidays and he had exhausted all his leave days. Termination of employment was lawful under Section 35 of the [*Employment Act*](#) which allowed a party to issue notice and compensation is not due whereas severance pay relates to a redundancy.
3. In the judgment of the learned magistrate, there was a finding that emoloyment was terminated lawfully since there was notice issued and the claims made were not justified.
4. The parties attended court and agreed to address the appeal by way of written submissions.
5. The appellant submitted that the respondent admitted to have issued the appellant with a termination notice without giving him any reasons as to why such employment was being effected. There was no due process resulting in unfair termination of employment. In the case of *Kioko v Astral Industries Limited* Cause No1980 of 2017 the court held that where there is a redundancy, the employer should issue notice to the employee giving such reasons and ensure payment of severance pay which was not done in this case. The employer must give a valid reasons to the employee before employment can lawfully be terminated as held in [*Geoffrey Nyabuti Onguko v Blow Plant Limited*](#) [2015] eKLR. The prayers sought in redundancy should be awarded.
6. The respondent submitted that the learned magistrate assessed the appellant's claims and established that there was proper notice terminating employment in terms of Section 35 of the [*Employment Act*](#). The reliefs sought with regard to continuing torts are time barred pursuant to Section 90(2) of the [*Employment Act*](#) as held in [*John Kiiru Njiiri v University of Nairobi*](#) [2021] eKLR. the appeal is without merit and should be dismissed with costs.
7. This being a first appeal, the court is required to analyse the record and finding of the lower court and make own conclusions but take into account there was no chance to hear the evidence.
8. As outlined above, the background of the appeal herein is the claim filed by the appellant before the trial court on the basis that he was issued with notice terminating his employment without being given any reasons. He thus claimed notice pay, leave day, public holidays and house allowances and severance pay. His case was dismissed on the basis that notice issued before employment terminated in terms of Section 40 of the [*Employment Act*](#) and that claims over 12 months were time barred.
9. The record is without the letter terminating employment referenced as dated 1st October 2018 issued to the appellant on 15 October 2018 when he resumed duty. The contents thereof can only be surmised from the evidence and submissions that the respondent under the belief of Section 35 of the [*Employment Act, 2007*](#) (the Act) was lawfully entitled to issue notice without assigning any reasons.
10. The learned magistrate, in the judgment delivered on 14 December 2022 has well relied in the case of [*Walter Ogal Anuro v Teachers Service Commission*](#) [2013] eKLR and the substantive issue referred therefore was that, for termination of employment to pass the fairness test, the employer must demonstrate that there was not only substantive justice but procedural fairness. That is, the employer issued with notice terminating employment is given notice and reasons leading to termination of employment with regard to misconduct, poor performance, incapacity or gross misconduct. Also, where there are operational requirements, necessitating a redundancy, such reasons must be given. from such reasons, the employee is able to take the next cause of action in terms of Section 47(5) of the [*Act*](#). Without giving the reason leading to termination of employment, the notice contemplated under Section 35 of the [*Act*](#) is premature.



11. The finding that there was proper termination of employment on the basis that the respondent complied with Section 35 of the Act is improper. The Act must be read in whole to give true meaning to its provisions.
12. The appellant was given notice, save, it lacked the substantive test and resulted in unfair termination of employment.
13. In terms of Section 45 and 49 of the Act, the appellant is entitled to compensation.
14. On the last wage of Kshs 17,966 compensation of 3 months gross wages is hereby found appropriate all at Kshs 53,898.
15. Unpaid leave for 3 years was declined on the grounds that this was a continuing injury contrary to Section 90(2) of the Employment Act. However, Section 90 of the Act allow an employee to claim for unpaid terminal dues within 3 years from the date the cause of action arose. While employment subsisted, the appellant was at liberty to seek in continuing injury.
16. Under Section 28 (2) of the Act, unpaid leave accrues for the last 18 months. Without any work records to confirm that the appellant was allowed to benefit from his right to take annual leave, on the basis wage of Kshs 17,820 he is entitled to due leave for 18 months all at Kshs 26,838.
17. With regard to the claim for unpaid public holidays, these are gazetted days and cannot be generalised.
18. On the claim for unpaid house allowances, the basic wage paid at Kshs 17,820 is the same gross wage. The appellant was employed as a guard from 5 January 2016 to October 31, 2018.
19. The wage payable to a guard at the time was Kshs 13,572 and a house allowance of 15% of the basic wage and payment of a gross wage of Kshs 17,820 well addressed due wage. A claim beyond such wage is not justified.
20. On the claim for severance pay, such only arise following a redundancy. As noted above, the letter terminating employment is not part of the record. The gist of the claim is that the notice terminating employment did not assign any reasons. That is addressed and compensation awarded.
21. On this basis, the appeal is found with merit and is hereby allowed with an award of Kshs 53,898 compensation and Kshs 26,838 in leave pay and 50% costs of the appeal.
22. Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27 DAY OF JULY 2023.

M. MBARŪ

JUDGE

In the Presence of:

Court Assistant: Japheth Muthaine

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