



**Kiruthu v Skyways Security Services Limited (Employment and Labour Relations Appeal E019 of 2022) [2023] KEELRC 1639 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1639 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E019 OF 2022**

**ON MAKAU, J**

**JULY 7, 2023**

**BETWEEN**

**JOHN KARANJA KIRUTHU ..... APPELLANT**

**AND**

**SKYWAYS SECURITY SERVICES LIMITED ..... RESPONDENT**

*(Being an Appeal against the Judgment of Honorable James Macharia, Senior Principal Magistrate in Nyeri Chief Magistrates ELRC Cause No. 14 of 2020 delivered on 4th October, 2022)*

**JUDGMENT**

1. By a Memorandum of Appeal dated 3<sup>rd</sup> November 2022, the appellant seeks to overturn the decision of Subordinate Court (Hon. James Macharia (SPM) on the following grounds.
  1. That the learned Trial Magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the Appellant's claim entirely thereby occasioning a miscarriage of justice.
  2. That the learned Trial Magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the Appellant's claim under the head of underpayment, service pay and housing allowance, thereby occasioning a miscarriage of justice.
  3. That the learned Trial Magistrate erred in law and fact by applying the wrong principles of law by failing to make a finding that the Appellant was not accorded due process towards his termination of employment, thereby occasioning a miscarriage of justice.
  4. That the learned Trial Magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at erroneous findings in the judgment, thereby occasioning a miscarriage of justice.



5. That the learned Trial Magistrate failed to address his mind to the pleadings on record and the evidence by the parties, thereby occasioning a miscarriage of justice.
  6. That the learned Trial Magistrate erred in law and fact in failing to evaluate the entire evidence as well as submissions as presented by the Appellant, thereby occasioning a miscarriage of justice.
2. The appeal then seeks the following orders;-
- i. A declaration that claimant's termination from employment was illegal, unlawful, unfair and inhumane and that the claimant is entitled to payment of his terminal dues in full.
  - ii. Compensation for unfair and illegal termination.
  - iii. An order for the respondent to pay the claimant his terminal dues amounting to Kshs.378,689.25.
  - iv. An order for the Respondent to issue the claimant with a certificate of service.
  - v. Costs of the claim plus interest thereon.

### **Background**

3. The Appellant was the claimant in the lower court and brought the suit alleging that his employment as a Security Guard had been terminated by the respondent unfairly and prayed payment of Kshs.378,689.25, certificate of service, costs and interest. The respondents denied the alleged unfair termination and averred that the appellant absconded from duty without just cause and when he was called upon to explain himself he became unruly and walked away before the hearing.
4. To support his claim the appellant testified as PW1 and adopted his written statement as his evidence. He also produced five (5) document as exhibits. In brief his case was that he was employed by the respondent from June 2018 and served diligently until 15<sup>th</sup> February, 2022 when he was dismissed summarily without just reason and without according him the due process provided for in the law including one month prior notice. He denied the alleged absenteeism and contended that he was on duty until the date he was dismissed. However, during cross examination, he admitted that the attendance register showed that he never signed from 7<sup>th</sup> to 16<sup>th</sup> June 2020. He maintained that he was never called for any hearing before the dismissal.
5. He further contended that he was subjected to salary underpayment during his employment as a night watchman by being paid between Kshs.6,000.00 and 8,000.00 as opposed to Kshs.14,038.00 minimum basic salary prescribed by the General Wage order, 2018.
6. The respondent's Operations Manager Mr. Fredrick Owino testified for the respondent as RW1. He also adopted his written statement as his evidence and produced six (6) documents as exhibits. In brief he stated that the claimant was employed by the respondent under a three (3) months contract from 31<sup>st</sup> December 2019. He further stated that the claimant absented himself from work from 7<sup>th</sup> February, 2020. The discovery of the claimant's absence was made when RW1 was in his routine patrol and checking attendance. He is the one who prepared all the documents he produced as defence exhibits.
7. RW1 stated that his effort to find out the appellant's whereabouts was in vain. On 14<sup>th</sup> February, 2020 he summoned the appellant to appear before him the following day to explain his absence. However, he refused to sign the charge sheet, became abusive and walked away. He contended that the appellant



was warned that he would be dismissed if he repeated the offence. The claimant just deserted and he was never dismissed.

8. As regards the alleged underpayment RW1 contended that the appellant was paid according to his employment contract. He admitted that the appellant was employed on 26<sup>th</sup> June, 2018 as a night guard. His salary was Kshs.8,000.00 but NSSF was paid for him. He contended that the last contract was renewed on 31<sup>st</sup> December 2019 for three (3) months.
9. After considering the evidence the trial court delivered its judgment on 4<sup>th</sup> October, 2022 in which it found that the appellant had not proved his case. The court was satisfied on the basis of the defence evidence that the appellant had absconded his duty and refused to attend disciplinary hearing. In the end the suit was dismissed with costs.

### **Appellant's submission**

10. It was submitted for the appellant that the trial court applied the wrong principles of law in dismissing the appellant's suit. It was submitted that the respondent did not discharge its obligation under section 43 and 45 of the Employment which require an employer to prove justifiable reason for dismissing an employee and that fair procedure was followed. It was argued that none of the other guards working at Wambugu Farm was called to confirm to the court that indeed the appellant absconded duty. Accordingly it was submitted that the respondent did not produce cogent evidence to prove desertion. Reliance was placed on *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR.
11. It was further submitted that the trial court also applied the wrong principles of law in dismissing the appellant's claim for notice pay, unpaid leave, underpayment, service pay and housing allowance. It was argued that the appellant worked for 21 months and therefore he was entitled for annual leave. It was submitted further that section 48 of the *Labour Institutions Act* requires that the minimum wage rates prescribed in a wage's order constitutes a term of employment to any employee to whom the wages apply. It was submitted the Kshs.8,000.00 was below the minimum pay under the General Wages Order, 2018.
12. Finally, it was submitted that the court should interfere with the findings of the trial court because extraneous matters and irrelevant considerations were taken into account, the court did not address its mind to the pleadings and evidence or to evaluate the same and thereby fell into error. Consequently, the appellant prayed for the appeal to be allowed and judgment be entered as prayed in the statement of claim.
13. The respondent on the other hand submitted that the appellant did not produce his case before the trial court and it was correctly dismissed. It was submitted that the appellant absconded duty from 7<sup>th</sup> February, 2020 and he was served with a show cause letter requiring him to attend hearing on 15<sup>th</sup> February, 2020. That when he appeared at the hearing he refused to sign the charge sheet and become violent and abusive and walked away. Reference was made to the Duty Attendance Register for 7<sup>th</sup> to 16<sup>th</sup> February, 2020 to prove that the appellant was absent from work.
14. It further submitted that it is not correct that the trial court failed to address his mind to the pleadings and evidence. It is the respondent's case that the court properly evaluated the evidence on record and as such there is no good reason for interfering with the findings of the trial court. For the said reasons, the court was urged to dismiss the appeal with costs.



## Mandate of this court

15. The mandate of the court in a first appeal is well cut out. The court is required to re-evaluate the evidence and the law and come up with its own conclusions noting that it did not have the advantage of seeing the witnesses at the witness box like the trial court. The court should also not interfere with a finding of fact unless it was based on no evidence, or the trial court acted on wrong principles or if the court took into account irrelevant considerations or failed to take into account relevant factors.
16. Having said that, the issues for determination arising from the appeal and submissions are:-
  - a. Whether the appellant was unfairly dismissed.
  - b. Whether the appellant is entitled to the reliefs sought in the suit.

## Unfair termination

17. Section 45 of the *Employment Act* provides that:-
  - “(1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer is unfair if the employer fails to prove –
    - a. That the reason for the termination is valid;
    - b. That the reason for the termination is a fair reason -
      - i. Related to the employee’s conduct, capacity or compatibility, or
      - ii. Based on the operational requirements of the employer; and
    - c. That the employment was terminated in accordance with fair procedure.”
18. In addition section 47 (5) of the Act places the burden of proof of unfair termination on the employee. This burden is discharged by adducing evidence that prima facie show that the employer did not have a valid and fair reason for terminating the employment, and that fair procedure was not followed. The appellant herein alleged in his evidence that he was unfairly dismissed from service on 15<sup>th</sup> February, 2020 without any reason and without following fair procedure. He denies that he absconded duty, and that he was invited to a disciplinary hearing on 15<sup>th</sup> February, 2020. He did not call any witness or rely on any documentary evidence to prove that he never missed work. He also did not produce any dismissal letter.
19. The respondent, on the other hand called RW1 as a witness and produced Duty Attendance Register to prove that the appellant indeed absconded duty. There is also evidence that the appellant was served with a show cause letter inviting him to attend disciplinary hearing on 15<sup>th</sup> February, 2020.
20. Having considered the entries in the Attendance Register produced as an exhibit by the respondent, I am satisfied that the weight of evidence tilts in favour of the respondent. Whereas the testimonies by PW1 and DW1 “is a case of your word against mine,” the documentary evidence corroborates the evidence by the RW1 that he never found the appellant on duty when he visited his work station during his daily patrols as the Operations Manager of the respondent.



21. As regards the procedure followed, the appellant alleges that he was not accorded a fair process. However, he did not state the circumstances in which the dismissal was done. On the other hand, RWI testified that he invited the appellant to a disciplinary hearing by a letter dated 14<sup>th</sup> February, 2020 which he personally served on the appellant. That the appellant appeared but became violent and walked away. The attendance register corroborates the foregoing because it shows that the appellant never signed on it on 15<sup>th</sup> and 16<sup>th</sup> February, 2020.
22. Having taken all the above observations into account, I find that the appellant did not discharge his burden of proof under Section 47 (5) of the *Employment Act*. Firstly he did not prove that he was indeed dismissed from employment by the respondent. Secondly, he has also not rebutted the oral as well documentary evidence by the respondent that, he absconded and thereby terminated his own employment. Consequently, I agree with the trial court that the appellant never proved his case of unfair termination on a balance of probability.

### Reliefs

23. In view of the foregoing finding, the appellant is not entitled to declaration that he was unfairly and unlawfully dismissed. Accordingly he is not entitled to salary in lieu of notice and compensation for unfair termination under section 49 of the *Employment Act*.
24. However as concerns the other reliefs sought, the trial court never addressed himself to the same. That is an error and abdication of duty. Having considered the prayers, I find that the appellant is entitled to his salary for the 6 days worked in February, 2020. He is also entitled to claim for leave earned in the 21 months served. The respondent did not adduce documentary evidence to prove that the appellant utilized his leave days or he was paid in lieu. The law entitles an employee to a minimum of 21 days leave per year equaling to 1.75 days per month. The claimant served for 21 months which works to 36.75 leave days. He pleaded outstanding leave days as 21.75 which I award cash in lieu.
25. The claim for service pay is also granted because RW1 admitted in evidence that the respondent never contributed NSSF contribution for the appellant. Section 35 (5) of the *Employment Act* entitles him to service pay. I assess it at the rate of 15 days pay for each completed year of service which was just one.
26. The claim for house allowance is also awarded because the employer has not proved that it provided the appellant with any housing during his 21 months of service. It has also not proved that the salary was consolidated with housing allowance. Section 31 of the *Employment Act* entitles an employee to housing or housing allowance from his employer. Therefore I award him 15% of the monthly basic salary as the house allowance.
27. Finally, the claim for salary underpayment is grounded on the 2018 General Wages Order. The order provided for minimum wage for night watchmen in the cities as Kshs.15,141.95, former municipalities Kshs.14,038.00 and other arrears Kshs.8,636.30. The respondent did not deny that the appellant was based in a former municipality. Therefore I find in favour of the appellant that his minimum basic salary was supposed to be Kshs.14,038.00 under the General Wage Order, 2018. As such his salary was underpaid as pleaded in the claim and the court awards him the arrears for the 21 months worked. The claim for certificate of service ought to have been granted under Section 51 of the *Employment Act*, and I allow that prayer.

### Conclusion

28. I have found that the trial court did not err in finding that the appellant did not prove a case of unfair termination against the respondent. However I have found that the trial court erred in failing



to consider and award the claim for leave, salary for days worked in February, 2020, service pay, salary underpayment and certificate of service. To that extent the appeal succeeds, the impugned judgment set aside and substituted with an order directing the respondent to pay the appellant the following:-

- a. 21.75 leave days x 14,038/30.....Kshs.10,177.55
- b. Unpaid salary June-December  
(Kshs.14,038 – 6000) x 7.....Kshs.56,266.00  
I award what is pleaded .....Kshs.49,266.00  
January 2019-January 2020  
(Kshs.14,038 – 8000) x 13.....Kshs.78,494.00
- c. Service gratuity.....Kshs.7,019.00
- d. House Allowance  
(Kshs.14,038 x 15%)x 21 months.....Kshs.44,219.70  
Kshs.189,176.25

The award is subject to statutory deductions but the appellant is awarded interest at court rates from the date of filing the lower court suit. The appellant will also have half costs of the appeal and the lower court.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

