



**Riley Falcon Security Services Limited v Mogere (Appeal
7 of 2020) [2023] KEELRC 1654 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1654 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL 7 OF 2020
CN BAARI, J
JULY 6, 2023**

**BETWEEN
RILEY FALCON SECURITY SERVICES LIMITED APPELLANT
AND
CORNELIUS ATEYA MOGERE RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. R.K Ondieki
(SPM) delivered on 27th May, 2020, in Kisumu CMELRC NO. 18 OF 2019)*

JUDGMENT

1. This appeal arises from a Judgment rendered on 27th May, 2020, where the Trial Court found in favour of the Respondent, and ordered payment of his terminal dues, compensatory damages, costs of the suit and interest thereon.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 24th June, 2020.
3. The appeal is grounded as follows: -
 - i. The Learned Magistrate erred in law and in fact in finding that the Plaintiff had been terminated from employment when there was no evidence to support the termination.
 - ii. The Learned Magistrate erred in law and in fact in failing to find that in any event, the Claimant's contract had lapsed by effluxion of time and hence, it was impossible for the Appellant to terminate him from employment.
 - iii. The Learned Magistrate failed to appreciate that the law on burden of proof is that the one who alleges must prove, and that the burden of proof does not shift from a Plaintiff to a Defendant until the same has been properly discharged.



- iv. The Learned Magistrate erred in law and in fact in failing to apply the principles that a Plaintiff must prove his case on a balance of probabilities.
 - v. The Learned Magistrate failed to appreciate that the Respondent had in fact conceded during his testimony that he had gone for his annual leave each year and hence ought not to have been awarded a prayer for leave earned but not taken which amounted to Kshs.116,000.00.
 - vi. The Learned Magistrate erred in law and in fact in awarding the exorbitant sum of Kshs.174,000.00 being damages for wrongful termination.
 - vii. The decision reached by the Court was against the weight of the evidence on record.
4. The Appellant prays that the appeal be allowed by setting aside the finding of liability against it by the subordinate court on account of unlawful termination, and in its place, the Respondent's suit in the subordinate court be dismissed with costs; or in the alternative, the award for leave days to the Respondent in the sum of Kshs.116,000.00 be set aside and the Court be pleased to review the award for general damages as awarded.
 5. The appeal was canvassed through written submissions and submissions were filed for both parties.

The Appellant's Submissions

6. It is the Appellant's submission that the Respondent raised a serious allegation of termination of employment, but failed to provide any evidence to prove this. It is the Appellant's further submission that it produced two important documents marked exhibits Nos.2 and 3, which prove the employment relationship was severed by the Respondent himself. The Appellant sought to rely in *John Kanyungu Njogu v. Daniel Kimani Maingi* (2002)eKLR to buttress this position.
7. The Appellant further submits that the Trial Court was wrong to make an inference that because the Respondent used to work for the Appellant, and no longer works, he must have been unfairly terminated.
8. It is the Appellant's submission that the burden of proof rested squarely on the Respondent to prove that the Appellant terminated him from employment as alleged and which he did not.
9. It is submitted that the Respondent failed to establish on a balance of probabilities that he was unlawfully terminated from employment, and that he did not resign from employment as pleaded by the Appellant.
10. The Appellant submits that the Respondent resigned from employment and therefore, voluntarily terminated his employment with the Appellant.
11. It is the Appellant's submission that the Respondent failed to discharge the burden of proof, and hence is not entitled to payment in lieu of notice or damages for wrongful termination, as he is the one who terminated the employment relationship.
12. The Appellant further submits that unless proved that the resignation was as a result of coercion; a fact that has not been raised by the Respondent, the Appellant cannot be held to have unlawfully terminated the Respondent's employment
13. The Appellant prays that its appeal be allowed.



The Respondent's Submissions

14. The Respondent submits that the issue of his contract ending by effluxion of time, did not arise at all during trial, was not raised in the Appellant's response to the claim, and nor was it raised during examination in chief or cross examination. It is his submission that this ground cannot be raised at this point.
15. The Respondent submits that the Learned Trial Court correctly exercised its discretion and applied the law on burden of proof.
16. It is the Respondent's submission that the Trial Court analysed the evidence on record as adduced by both parties and found that the Respondent had the burden to prove that he had been terminated by the Appellant, while the Appellant had the burden to prove that the reason for termination, if at all, was valid, fair and that it had followed the right procedure.
17. The Respondent further submits that having denied authoring the resignation letter, the burden then rightfully shifted to the Appellant to prove otherwise in accordance with Section 70 of the *Evidence Act*. It is the Respondent's further submission that the Trial Magistrate correctly addressed the issue of burden and standard of proof.
18. The Respondent's further submission is that the *Employment Act* does provide for the damages awardable to an employee upon proof of unfair termination, and include an equivalent of a number of months' wages not exceeding 12 months based on the gross salary earned by the Claimant at the time of dismissal.
19. It is his final submission that the Trial Court correctly awarded the remedies as prayed by the Respondent after finding that the Appellant had wrongfully and unfairly terminated him
20. The Respondent finally prays that this Court upholds the judgment of the Trial Court.

Analysis and Determination

21. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The grounds of appeal are summarized as here under: -
 - i. The Learned Magistrate erred in law and fact in failing to apply the principle that a plaintiff must prove his case on a balance of probabilities.
 - ii. The Learned Magistrate failed to appreciate that the Respondent had in fact conceded during his testimony that he had gone for his annual leave each year and hence ought not to have been awarded a prayer for leave earned but not taken which amounted to Kshs.116,000.00.
 - iii. The Learned Magistrate erred in law and in fact in awarding the exorbitant sum of Kshs.174,000.00 being damages for wrongful termination.
22. In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A, Madan J.A had this to say on appeals:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law: secondly, that he misapprehended the facts;



thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

23. The Trial Court found that the Respondent was unfairly terminated both on account of procedure and for lack of valid, fair and justified reasons for the termination. The Appellant’s position was that it did not terminate the Respondent, but instead, asserts that he resigned from his position.
24. During the hearing, the Appellant’s witness (RW1) told the Trial Court that the Respondent had in fact resigned from their employ and produced a letter of resignation said to have been authored by the Respondent, but which letter, the Respondent denied knowledge of, or having written a resignation at all.
25. In one of the grounds upon which this appeal is premised, the Appellant contends that the Respondent’s contract terminated by effluxion of time. It is not clear why at one point the Appellant takes the position that the Respondent resigned, and yet in another, contend that his contract ended by effluxion of time. The two are not one and the same.
26. These varied positions in my view, cast doubt on whether the Appellant is honest on how it separated with the Respondent, and the validity of the resignation letter produced before the Trial Court.
27. Further, it was on the basis of failure by the Appellant to prove that the resignation letter was indeed from the Respondent, that the Trial Court returned that the Respondent was unfairly terminated.
28. It is not disputed that the Respondent was an employee of the Appellant for a record eight years – between 2010 and 2018. The issue before the Trial Court was how he left the service of the Appellant.
29. In a letter dated 10th September, 2010, the Appellant appointed the Respondent to their permanent and pensionable service and which position was confirmed by the two witnesses who testified before the Trial Court.
30. It has largely been held that where a Trial Court has been engaged in a matter where there was conflict in the primary evidence, an Appellate Court should not interfere with the Trial Court’s discretion unless there are compelling reasons to do so. In *Erastus Onyango v Manoa Malenya* [2015] eKLR the Court opined thus: -

“ An Appellate Court will hardly interfere with the conclusion made by a Trial Court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial.”
31. Again in *Ndiema Samburi Soti v Elvis Kimtai Chepkeses* [2010] eKLR the Court of Appeal stated: -

“Moreover, where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial, the appellate court will hardly interfere with a conclusion made by the trial judge after weighing the credibility of witnesses. The court will however interfere when the findings of fact are based on no evidence or on a misapprehension of evidence or where it is shown that a trial judge has acted on wrong principles in arriving at the finding in issue”
32. The Respondent having denied writing a resignation letter, and there being no further prove that he indeed resigned from the service of the Respondent or even clarity on whether his contract ended by effluxion of time or by resignation, I find no reason to interfere with the finding of the Trial Court that the Respondent was unfairly terminated.



33. The Trial Court's finding in this respect is thus upheld.
34. The final award by the Trial Court stated: -
- “The Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.”
35. The Respondent in his statement of claim sought the following reliefs:
- i. One-month salary in lieu of notice Kshs. 14,500.
 - ii. Damages for loss of employment 14500x12 Kshs. 174,000.
 - iii. Leave earned Kshs. 116,00.0
36. The next issue is whether the Learned Trial Magistrate erred in making an award of Kshs. 116,000 in respect of leave earned. The Appellant's position is that the Trial Court erred in failing to appreciate that the Respondent had conceded during his testimony that he had gone for his annual leave each year, and hence ought not to have been awarded a prayer for leave earned but not taken, in the sum of Kshs.116,000.00.
37. The Respondent in his examination in chief told the Trial Court that he was not paid any money upon his termination. On cross-examination, the Respondent admitted that he took his leave every year, and was paid for it.
38. On this basis, I find the award of Kshs. 116,000/- on account of leave earned unmerited and is hereby set aside.
39. The Appellant's witness admitted that the Respondent was entitled to final dues. A final dues form submitted in evidence indicates that the Respondent is owed Kshs. 14,621.56 on account of one-month salary in lieu of notice.
40. The award in respect of notice is found to have merit is hereby upheld.
41. The Trial Court did not again provide reason(s) for awarding twelve (12) months' salary in compensatory damages. In *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR it was held that in determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the *Employment Act*.
42. Further, the Court of Appeal in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR pointed out that an award of the maximum of 12 months pay must be based on sound judicial principles, and that the trial judge must justify or explain why a claimant is entitled to the maximum award.
43. A finding of unfair termination entitles a claimant to compensation. The finding herein, is premised purely on a conflict of primary facts between witnesses. Considering the opportunities available to the Respondent for securing comparable employment with another employer, I deem an award of Six (6) months' salary sufficient compensation for the unfair termination.
44. In the premise, I make orders as follows: -
- i. That the Trial Court's finding that the Respondent was unfairly terminated is upheld.



- ii. The award of 12 months' salary in compensation for unfair termination is set aside, and substituted therewith six (6) months' salary as compensation for the unfair termination at Kshs. 87,000/-
- iii. The award of Kshs. 116,000 for leave earned is set aside in its totality.
- iv. The award of one-month salary in lieu of notice at Kshs. 14,500/- is upheld.
- v. The award of costs and interest is set aside, and substituted with half the costs of the suit and interest thereon.
- vi. The appeal having partially succeeded, parties shall bear their own costs of the appeal.

45. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF JULY, 2023.

C. N. BAARI

JUDGE

Appearance:

Ms. Anuro h/b for Ms. Omollo Achieng for the Appellant

Mr. M. C. Ouma present for the Respondent

MS. Christine Omolo - Court Assistant.

