



**Kombo v Riley Falcon Security Services Limited (Appeal E044 of 2021)
[2023] KEELRC 2119 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2119 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E044 OF 2021
CN BAARI, J
SEPTEMBER 21, 2023**

BETWEEN

NICHOLAS OKIRO KOMBO APPELLANT

AND

RILEY FALCON SECURITY SERVICES LIMITED RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. W. K. Onkunya
(SRM) delivered on 27th October, 2021 in Kisumu CMELRC No. 105 of 2020)*

JUDGMENT

1. The appeal herein, arises from a Judgment rendered on 27th October, 2021, where the Trial Court entered judgment in favour of the Appellant for payment of one-month salary in lieu of termination notice. The Appellant was not awarded damages for loss of employment and other prayers sought in the Appellant’s statement of claim before the Trial Court.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 4th November, 2021.
3. The appeal is premised on the grounds That:
 - i. The Trial Magistrate erred in law and fact in failing to award the Appellant damages for loss of employment as prayed when the evidence and the law entitled the Appellant to the said award and therefore occasioned a travesty of justice against the Appellant.
 - ii. The Trial Magistrate erred in law and fact in failing to award the Appellant leave earned and not paid when the evidence and the law entitled the Appellant to the said award and therefore occasioned a travesty of justice against the appellant.



- iii. The Trial Magistrate occasioned a travesty of justice by misapprehending the law and facts placed before her and failing to take into account the submissions placed before her by the Appellant.
4. Submissions on the appeal were filed for both parties.

The Appellant's Submissions

5. It is the Appellant's submission that he tendered sufficient evidence that demonstrated his claim against the Respondent as spelt out in the Memorandum of Claim.
6. The Appellant submits that he was unlawfully terminated by the Respondent both in substance and procedure, and was therefore fully entitled to the full extent of the reliefs sought in the memorandum of claim.
7. The Appellant's further submission is that the Respondent did not summarily dismiss him for a lawful cause and that even after the dismissal, the Respondent did not pay him his terminal dues. It is his further submission that the Respondent breached Section 18(4) of the Employment, Act.
8. The Appellant submits that the reasons and grounds upon which he was terminated were not valid grounds.
9. The Appellant invites this Court to find that the appeal herein has merit and accordingly allow the appeal, set aside the Judgment and replace the same with a Judgment allowing the claim by the Appellant as spelt out in the Memorandum of claim.

The Respondent's Submissions

10. The Respondent submits that the damages sought by the Appellant are only available subject to a finding of wrongful dismissal or unfair termination and that the award is an exercise of discretion. The Respondent had reliance in the Court of Appeal decision in *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union* [2016] eKLR to buttress this position.
11. The Respondent submits this court is being invited to interfere with the trial court's exercise of its discretion. It sought to rely in *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others* [2014] eKLR, for the holding that the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself/herself in some matter, and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.
12. It is the Respondent's submission that the parties herein, had a valid employment contract which was to terminate automatically with the termination of a contract between the Respondent and a client.
13. The Respondent further submits that the Appellant was informed of the termination of the contract between the Respondent, and the client (KPLC Kisii), whom the Respondent had been assigned to, thus, the termination was lawful.
14. The Respondent further avers that the Appellant/Claimant should not make a claim for unfair termination as Section 45(3) of the *Employment Act* because the Act reserves this right for an employee who has been employed continuously for a period of 13 months.
15. It is the Respondent's submission that the Appellant was employed on fixed term contract in December, 2019, and that prior to that, he had been involved with the Respondent but such was not a continuous employment.



16. The Respondent submits that the Appellant sought Kshs. 218,959 as leave earned but had not mentioned this in the witness statement and neither did he mention this during the proceedings.
17. The Respondent further submits that the Appellant proceeded on leave at the end of each contract and before commencing any new contract, and which fact the Appellant admitted during cross-examination that he utilized his leave days.
18. The Respondent submits that it already paid the Appellant as ordered by the Honorable trial Court and that this Appeal was an afterthought.
19. The Respondent prays that the appeal be dismissed with costs.

Analysis and Determination

20. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The grounds of appeal are summarized as follows: -
 - a. Whether the Trial Court erred in not awarding the Appellant for loss of employment/or compensating and
 - b. Whether the Trial Court erred in not making an award for leave earned and not paid.

Whether the Trial Court erred in not awarding the Appellant for loss of employment

21. The Court of Appeal in *Selle & Another v Associated Motor Boat Co Ltd* [1968] EA 123 set the guiding principle in dealing with a first appeal as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

22. Further, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, while handling a first appeal from the High Court, the Court of Appeal held that:

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned Trial Judge are to stand or not and give reasons either way”

23. The role of this Court as a first Appellate Court in this matter, is to re-evaluate, re-assess and re-analyse the evidence on record and determine whether the conclusions reached by the learned Trial Court are to stand or not.
24. The Appellant sought to be awarded for loss of employment/compensatory damages on the premise that his dismissal from the service of the Respondent did not adhere to due process.
25. In the judgment by the trial court, the court premised its decision on the contract between the Respondent and Kenya Power and Lighting Company which was for a period of three months. It



- returned that the contract having terminated on 31st March, 2020, the Respondent had valid reason to terminate the appellant.
26. There are two contracts at play in this matter. One between the Respondent and the Appellant, and another between the Respondent and KPLC, which is not a party to this suit.
 27. The Contract between the Appellant and the Respondent is dated 2/12/2019 and which was to be valid until 2/12/2020. This contract was instead terminated on 31st March, 2020, premised on the termination of the Respondent's contract by KPLC where the Appellant was assigned as a security guard.
 28. It is this termination that the Appellant deems unfair and for which he claims compensatory damages for loss of employment.
 29. The Appellant's contract carried a clause that tied his service with the Respondent to the contract between KPLC and the Respondent and which expressly provided that should KPLC terminate the contract with the Respondent, the Appellant's contract will equally automatically terminate.
 30. The contract between KPLC and the Respondent was for a period of three months and was entered into on 13th February, 2020. The Appellant's contract with the Respondent was already in force as early as 2/12/2019, and it cannot thus be said that the Appellant was hired solely for purposes of the Respondent's contract with the KPLC.
 31. Further, clause 9.3 of the Appellant's contract with the Respondent and which formed the basis for the decision of the trial court states thus:

“Your services with the company shall be tied to the assignment and should the client terminate his services with the company, your own contract shall automatically be terminated.”
 32. This contract was entered into in 2019, while the Respondent's contract with KPLC was entered into in February, 2020. This thus confirms that clause 9.3 of the Appellant's contract with the Respondent was not in any way related to the Respondent's contract with KPLC. Moreover, if the Respondents contract with KPLC expressly carried a term of three months, why then was the Appellant given a one-year contract?
 33. The Supreme Court in *Kenfreight (EA) Limited v Benson K. Nguti* [2016] eKLR, held that it is not enough to terminate employment by notice or payment in lieu thereof; termination should be based on valid reasons and fair procedure.
 34. The Appellant's termination was not for reason of misconduct or poor performance and therefore the issue of procedure does not arise. The only issue in this matter is the reason for the termination of the Appellant's contracts which as explained above, does not hold. In *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR the Court stated,

“It is now clear that the burden placed on an employer by Section 43 of the *Employment Act* is to establish a valid reason that would cause a reasonable employer to terminate employment.”
 35. Further, in *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union* [2017] eKLR it was held that the Court looks into the validity and justifiability of the reasons for termination.



36. I thus conclude by holding that the termination of the Appellant's contract was not based on valid, fair and justified reasons which then renders the termination unfair.
37. Having found the Appellant's termination unfair, it follows that he is entitled to compensation for the unfair termination in accordance with Section 49 and 50 of the [Employment Act](#), 2007. (See Benjamin Langwen v National Environment Management Authority [2016] eKLR.)
38. The Appellant had served only 4 months of his contract and had about 9 months still valid under his contract with the Respondent. Section 49 of the [Employment Act](#) does not provide for compensation for the remainder of the term of contract, instead, it allows the Court discretion to award up to a maximum of twelve months' salary depending on the circumstances of each case.
39. In Kenya Ports Authority v Festus Kipkorir Kiprotich [2014] eKLR the Court held that the measures of compensation should be guided by the statutory capping at the time of termination.
40. Considering the period that the Appellant was to continue serving but for the termination, and the opportunities available for him to secure comparable employment, I deem a five months' salary sufficient compensation for the unfair termination.
41. On whether the Appellant is entitled to leave earned but not paid, the Appellant had only served for four (4) months under the contract subject of this case. He thus cannot have earned leave within the period served.
42. The Trial Court's decision did not address the issue of leave. I find the claim for leave earned without merit and is dismissed.
43. In whole, the Court makes orders as follows: -
 - i. The award of one month's salary in lieu of termination notice is upheld.
 - ii. A declaration that the Appellant is entitled to compensatory damages for unfair termination
 - iii. That the Appellant is awarded 5 months' salary as compensation for unfair termination at Kshs. 84,215/-
 - iv. The Respondent shall bear the costs of the appeal.
44. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21ST DAY OF SEPTEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Appellant

Mr. Ndolo h/b for Mr. Otieno David for the Respondent

MS. Christine Omolo - Court Assistant.

