



**Sanghani v Rotich (Appeal E015 of 2023)
[2023] KEELRC 2301 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2301 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E015 OF 2023
M MBARŪ, J
SEPTEMBER 21, 2023**

BETWEEN

RK SANGHANI APPELLANT

AND

EDWARD KIPWAMBOK ROTICH RESPONDENT

(Being an appeal against the judgment and decree of Hon. D.O. Mbeja, Principal Magistrate delivered on 13 February 2023 in Mombasa MC ELRC 319 of 202)

JUDGMENT

1. The facts leading to this appeal is that the respondent filed his Memorandum of Claim before the lower court on the grounds that he was an employee of the appellant as a security guard from 23 July 2018 to 23 June 2020 when his employment was verbally terminated. He claimed for compensation for unfair termination of employment, notice pay, severance pay, underpayment and leave pay.
2. In response, the appellant made mere denials and denied all the claims and that there was no employment to justify the claims made. But, the appellant field a witness statement of Said Charo Kaingu who testified that the respondent was employed on casual basis as a security guard from 4 November 2018 on a daily wage of Ksh.300 paid weekly but on 23 May 2020 he failed to report to work, a notice to show cause issued on 2 June 2020 through his WhatsApp number and a copy served upon the labour officer for desertion of duty.
3. The appeal herein is from the judgment in MC ELRC No.319 of 2020 delivered on 13 February 2023 allowing the claim filed by the respondent and the finding that his employment was unfairly terminated by the appellant. Aggrieved, the appellant has challenged the judgment on the grounds that the trial court failed to consider its responses by finding that there was no desertion of duty in error and hence the awards of notice pay, wage arrears, severance pay, underpayments and leave pay should be set aside.
4. Both parties attended and agreed to address the appeal by way of written submissions.



5. The appellant submitted that the lower court allowed the claim by the respondent with compensation at 12 months, notice pay, salary arrears, severance pay and underpayments without regard to the evidence by the appellant. The respondent did not file any document to support his case. He was a casual labourer on a daily wage paid weekly and without producing any record to prove permanent employment, he cannot rely on Section 37 of the Employment Act, 2007 (the Act) to claim any other benefit outside his daily wage. Section 47(5) of the Act requires a claimant to prove his case which was not done. By desertion of duty, the respondent terminated his employment and his claim of compensation and notice pay should not be awarded. The claims allowed should be re-valuated and dismissed with costs.
6. The respondent submitted that the appellant called its witness who admitted that the respondent was an employee as a security guard and on this basis, his claims were properly assessed by the lower court and should be confirmed and the appeal dismissed with costs.
7. This being a first appeal, the court is mandated to re-evaluate the pleadings, evidence and reach own conclusions.
8. The employment of the respondent by the appellant is not in dispute save for the terms. The appellant's case is that the respondent was a casual employee paid a daily wage every week. The respondent asserted that he was on a verbal contract of employment.
9. Section 8, 9 and 10 of the Act requires the employer to issue the employee with written terms and conditions of employment. Without such a record by the employer, and where the employee remains in the service of the subject employer beyond 24 hours on work that is continuous and not likely to end each day, such an employee is protected under Section 37 of the Act as held in the case of Rashid Mazuri Ramadhani & 10 others v Dosbi & Company (Hardware) Limited & another [2018] eKLR well relied upon by the appellant. An employee employed on casual terms and continues in such duties beyond 24 hours for a casual employee, under Section 37 of the Act, the employee is protected. The employee has rights and benefits under the Act.
10. An employee who deserts work commits gross misconduct and is subject to summary dismissal. However, the employer must issue notice and allow the employee to attend and defend himself in terms of Section 41(2) of the Act.
11. With new technology that allow access and ease of communication, employers have taken up various modes of communication through technology. In this case, the appellant asserts that they summoned the respondent through whatsapp communication and copied to the labour officer.
12. Section 10(2) of the Act gives a detailed approach to the nature of an employment contract. The employer must outline the physical address of the employee, the gender, the postal address, telephone address and including other key features which must be put into account.
13. The use of whatsapp must therefore not be outside the allowed communication channels under the Act but as a support thereof. The employee should not be disadvantaged by the mode of communication used by the employer for ease, particularly where the notice issued is with the consequence of termination of employment. Recourse must be to the mode of communication that the employer can ascertain receipt of such notice.
14. In this regard the trial court analysed the evidence before it and made a sound finding that the appellant did not issue proper notice to the respondent leading to unfair termination of his employment.
15. The employee cannot terminate his own employment at will, notice must emanate from the employer. Where desertion of duty is alleged as held in the case of Ayub Kombe Ziro v Umoja Rubber Products



Limited [2022] eKLR the employer has the duty to prove that the employee was issued with notice and he failed to attend. In the case of *James Okeyo v Maskant Flower Limited* [2015] eKLR, the court held that;

... the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.

16. In this regard, notice pay was correctly assessed at one months gross wage, but at the wage due for an employee placed at Kilifi County at Ksh. 7,930.40
17. With regard to the awards made by the learned magistrate, the claims made were allowed as prayed. However, these should be analysed and justified and the rationale for each award given.
18. The award of 12 months compensation being the maximum award that the court can award under Section 49 of the Act must be justified and reasons for the highest allocation given. In *Gas Kenya Limited v Odhiambo* (Appeal E006 of 2022) [2022] KEELRC 3930 (KLR) (22 September 2022) (Judgment), the court in addressing a similar matter held that the award of 12 months must be reasonable and with stated reasons. And in the case of *Alfred Muthomi & 2 Others v National Bank of Kenya Limited* [2018] eKLR the Court held that in granting 12 months' salary as compensation for unfair termination, it considered the Claimants long service.
19. In this case, the award of 12 months by the learned magistrate is not given any justification taking into account the respondent served from the year 2018 to 2020, a period of 2 years. Without the required justification, this court is bound to review the award of the lower court.
20. On this basis, on the finding of unfair termination of employment, an award of two months gross wage is hereby found appropriate. The respondent was placed at a site in Kilifi County and the wage due for the period of service was Ksh.6,896.15. The due house allowance included, the total is Ksh. 7,930.40. The compensation award is Ksh.15,860.80.
21. On the claim for salary arrears for June 2020, the appellant's case was that the respondent was on a daily wage of Ksh.300 and was paid for days worked. This misapplication of the respondent's work status is addressed above with a finding that having been in the continuous service of the appellant, he was secured under the provisions of Section 37 of the *Act*. However, under such belief that he was on casual terms, wages were only paid for days worked which is lawful save, the benefits due should have been pleaded and claimed accordingly.
22. The appellant company is based at Kilifi and the respondent testified that he was allocated duties at Kokotoni yard in Kilifi County. From July 2018, the daily wage for a security guard employed in Kilifi was Ksh.349.50 which translates to an underpayment of Ksh.49.50 per day. For the 2 years, a claim of Ksh.7,853.10 in underpayment is correctly assessed.
23. On the claim for severance pay, such is not due in a general case of termination of employment outside the provisions of Section 40 of the *Act*. This award is without basis in fact or in law.
24. Annual leave is a right secured under Section 28 of the *Act* and where an employee is secured under the provisions of Section 37 of the *Act*, such a benefit accrue. The basis is 21 days of annual leave each year and on the basic daily wage due of Ksh.349.50, the total leave pay due is Ksh.14,679 for the two years.
25. At the end of employment, a Certificate of Service should issue in terms of Section 51 of the *Act*.
26. On the analysis above, the appeal partially succeeds and the awards of the lower court hereby reviewed in the following terms;



- a. Employment terminated unfairly;
- b. Compensation awarded at Ksh. 15,680.80;
- c. Notice pay Ksh. 7,930.40;
- d. underpayment Ksh.7,853.10;
- e. Annual leave Ksh.14,679;
- f. A certificate of service shall issue in terms of Section 51 of the [Employment Act](#), 2007;
- g. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

