



**Solvit Security Solutions Limited v Masase (Appeal E089 of 2022)
[2023] KEELRC 2300 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2300 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E089 OF 2022
M MBARÚ, J
SEPTEMBER 21, 2023**

BETWEEN

SOLVIT SECURITY SOLUTIONS LIMITED APPELLANT

AND

PETER MOGUSHE MASASE RESPONDENT

*(Being an appeal from the judgment of Hon. D.O. Mbeja, delivered
on 31 October 2022 in Mombasa CMELRC No. E317 of 2021)*

JUDGMENT

1. The background to this appeal is that the appellant employed the respondent as a night guard at a monthly wage of Kshs. 11,500 from the year 2013 until 13 August 2020 when he handed over his duties but was called and informed that there were missing items and since, was not allowed to resume duty and salary for July 2020 was not paid. the respondent made a claim for payment of his terminal dues;
 - a. Salary for July 2020 at Kshs. 15,141.95;
 - b. Notice pay Kshs. 15,141.95;
 - c. 56 unpaid leave days Kshs. 28,264.88;
 - d. Outstanding house allowances Kshs. 61,324.89;
 - e. Underpayments for 28 months Kshs. 98,332.65;
 - f. Compensation for unfair termination of employment Kshs. 181,703.40;
 - g. Unremitted Sacco deductions;
 - h. Certificate of service; and



- i. Costs.
2. In response to the claim, the appellant's case was that on 12 September 2020 the respondent was involved in stealing a client's metals and when they called he could not be traced and it became a police case and the respondent stopped attending work from 13 September 2020. The appellant served the respondent with notice dated 16 September 2020 for deserting duty but he failed to respond leading to notice terminating his employment dated 24 September 2020 for lawful cause.
3. On the claims made, the appellant's case was that the respondent took all his due annual leave days from 1st December 2018 going back to the year 2015. That the salary paid was lawful and without any underpayments as alleged, the salary was consolidated consisting due house allowances and upon clearance, the certificate of service can issue.
4. In the judgment, the learned magistrate held that the appellant terminated the respondent's employment without issuing hi with a show cause notice and there was no disciplinary hearing leading to unfair termination of employment and proceeded to award all the claims.
5. The appeal herein follows judgment delivered on 31 October 2022 in Mombasa CMELRC No. E319 of 2021 and on the grounds that;
 1. The learned magistrate erred in law and fact in finding that the respondent wrongfully, unfairly and unlawfully constructively terminated the claimant's employment.
 2. The learned magistrate misdirected himself by failing to fully appreciate and correctly analyse the pleadings and evidence before him.
 3. The learned magistrate erred in law and fact by allowing all the claims prayed in the memorandum of claim.
 4. The learned magistrate erred in law and fact by misdirecting that that the claimant pays costs to the respondent.
6. Both parties attended and agreed to address the appeal by way of written submissions.
7. The appellant submitted that the respondent was involved in several disciplinary cases in the course of his employment the last being theft of metals on 12 September 2020 and since, he absconded duty and despite being issued with notice he did not attend following which a notice terminating his employment on 24 September 2020 issued. In the case of Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR that an employer who alleges desertion by the employee must prove and in this case, the appellant issued notice to the respondent and he failed to address and notice terminating his employment was issued as held in Joseph Nzioka v Smart Coating Limited [2017] eKLR. the respondent having absconded duty, the appellant was justified in terminating his employment and the award of compensation and notice pay ought not to have issued. The appellant submitted work records to demonstrate that the respondent was on his annual leave. The wage of Kshs. 11,500 was upon statutory deductions and Sacco contributions and this was consolidated with house allowances and the appeal should be allowed.
8. The respondent submitted that the respondent had a basic wage of Kshs. 11,500 which was an underpayment and not consolidated as alleged. The respondent worked until 13 August 2020 when he was called with information that there were missing items at work yet he had already handed over to the day guard. His employment was terminated for no good cause and the wages for July 2020 were not paid. Section 41 of the *Employment Act*, 2007 requires that before employment is terminated, the employer must issue notice to the employee and hear him in his representations which was not done



to the respondent leading to unfair termination of employment and the claims awarded should be confirmed as held in *Kosgei v Metkei Multi-Purpose Company Limited* Civil Appeal No.95 of 2017.

Determination

9. This being a first appeal, the court is under a duty to re-evaluate the evidence and analyse the pleadings and arrive at own conclusions and findings.
10. At the core of the learned magistrate's judgment is the finding that the appellant unfair terminated the respondent in his employment and further awarding him all the claims made.
11. It is settled law under Section 44(4) of the *Employment Act*, 2007 that an employee who absents himself from duty faces the sanction of summary dismissal and all what the employer should prove is that the employee was issued with notice and he failed to show good cause of failed to attend.
12. The claim before the trial court was that on 13 August 2020 the respondent was recalled back on duty and told that there were items missing after his shift ended. He was not allowed back at work after this date and his efforts to call his manager to know his fate did not bear fruits.
13. The appellant on the other hand had its case that on 12 September 2020 the respondent stoles some metals at the client's site and the police was called in and from 13 September 2020 he did not return to work upon which notice issued and leading to termination of employment.
14. The variances with regard to the events leading to termination of employment were not addressed by the trial court save to regurgitate the pleadings in the Memorandum of Claim as submitted by the respondent herein.
15. In evidence, the respondent testified that the notices dated 16 and 24 September 2020 were never served on him. his wages for July 2020 were not paid but in June 2020 he was paid Kshs. 6,500 while his Sacco contributions were Kshs. 5,700.
16. The respondent also testified and confirmed that his gross monthly wage was Kshs. 13,500 and he worked until 12 August 2020.
17. In evidence, the respondent called Charles Nyakoni Obara the human resource officer who testified that the respondent deserted duty last earning a wage of Kshs. 11,500 all inclusive. On the alleged theft, there is no statement recorded with the police and the notices issued to the respondent on 16 and 24 September 2020 were not acknowledged by the recipient.
18. The variances noted with regard to dates and events leading to the exit of the respondent were not addressed by the appellant. The notices dated 16 and 24 September 2020 hence noted by Charles Nyakoni Obara as not served upon the respondent, as noted above, pursuant to Section 44(4)(a) of the *Employment Act*, 2007 (the Act), the employer who pleads desertion of duty must prove. Further, the employer must demonstrate what efforts were taken to have the subject employee alleged to have absconded duty attend and make his representations.
19. A review of the notices dated 16 and 24 September 2020 show that there is no forwarding address to the respondent.
20. How then was the respondent to know that he was required to respond to a case of desertion of duty? That his employment had been terminated?
21. Section 10(2) and (3) of the Act requires the employer to issue the employee with a written contract and therein, indicate the physical and postal address of the subject employee.



- (2) A written contract of service shall state—
- (a) the name, age, permanent address and sex of the employee;
 - (b) the name of the employer;
 - (c) the job description of the employment;
 - (d) the date of commencement of the employment;
 - (e) the form and duration of the contract;
 - (f) the place of work;
 - (g) the hours of work;
 - (h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;
 - (i) the intervals at which remuneration is paid; and
 - (j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and
 - (k) any other prescribed matter.
22. These details only become useful in instances as cited by the appellant, that the respondent deserted duty and notices issued to him but without any address, the alleged notices filed with the response have no probative value in this regard. Such notices were not served upon the respondent.
23. The finding by the learned magistrate that employment terminated unfairly cannot be faulted save, each claim ought and should have been assessed on the merits and reasons given for each award.
24. On the findings that employment terminated unfairly, notice pay is correctly awarded.
25. The respondent's case was that he was law earning Kshs. 13,500 and the response is that he was earning Kshs. 11,500 which was net wage after statutory deductions and included house allowances.
26. The respondent testified that he would receive Kshs. 6,500 as his wage which was less Sacco deductions of Kshs. 5,700, NSSF Ksh.200 and NHIF Ksh.500. the total is Kshs. 12,900.
27. A night guard working in Mombasa in the year 2018 had a basic wage of Kshs. 15,141.95 and a 15% house allowance of Kshs. 2,271 gross being Kshs. 17,412.95 which is hereby awarded in notice pay.
28. With regard to compensation, the general award of 12 months' gross salary in compensation ought and should be with stated reasons taking into account this maximum is the highest award on a finding of unfair termination of employment. the learned magistrate gave this general award at the highest rate without stating what reasons guided such an award.
29. The respondent had worked for the appellant from the year 2013 to 2018 and he testified that his exit followed a case of alleged missing items which matter is not gone into by the appellant and no record of such theft was submitted. In these circumstances, an award of three (3) months gross wage is hereby found sufficient compensation all at Kshs. 52,239.
30. Annual leave is a rights under Section 28 of the Act. however, the records submitted by the appellant to prove that the respondent took his annual leave are generic. These looked at with a naked eye show



a systematic attendance and approval by a single hand. It is not possible that every time the respondent applied for his annual leave, the same hand was used and applied with the same diction and tenure.

31. The manner of issuing the notices cited above comes to bear on the appellant. These records are doctored for the court purpose.
32. Under Section 28(2) annual leave can only be backdated for up to 18 months. On a basic wage of Kshs. 15,141 the respondent only accrued 31 days of annual leave assessed at Kshs. 15,645.70.
33. On the above analysis, there was an underpayment claimed underpayments May 2018 – August 2020 3,641.95 x 27 months and based on the evidence, the respondent was earning Kshs. 13,500 per month and the due basic wage of Kshs. 15,141 the underpayment is Kshs. 1,641. For the 27 months, the total underpayment is Kshs. 44,307 since house allowances is claimed separately.
34. With regard to the house allowance for the same period, the assessment at 15% is at Kshs. 2,271 x 27 months all at Kshs. 61,317.
35. For the unremitted Sacco dues, this matter was not gone into in the entirety of the proceedings. However, where an employee is a member of a Sacco due to his employment, all terminal dues paid to him at the end of employment must factor in any unpaid dues thereof and the employer is under a legal duty to make such a deduction.
36. A certificate of service should issue upon the employee handing over his work tools in accordance with Section 51 of the Act.

Who should pay costs?

37. In employment and labour relations, award of costs is not automatic. Even to the party holding an award, costs should be awarded on good basis. Without any reasons for the allocation of costs, the award by the trial court is hereby set aside.
38. Accordingly, the appeal herein partially succeeds and the judgment in Mombasa CMELRC No. E317 of 2021 is hereby reviewed in the following terms;
 - a. Compensation Kshs. 52,239;
 - b. Notice pay Kshs. 17,412.95;
 - c. Leave pay Kshs. 15,645.70;
 - d. Underpayments Kshs. 44,307;
 - e. House allowances Kshs. 61,317;
 - 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

