



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mae v Brinks Security Services Limited (Appeal E078 of 2021)  
[2023] KEELRC 2705 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2705 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E078 OF 2021  
M MBARŪ, J  
OCTOBER 30, 2023**

**BETWEEN**

**JOHN KADENGE MAE ..... APPELLANT**

**AND**

**BRINKS SECURITY SERVICES LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. M. L. Nabibya PM  
dated 7 October 2021 in Mombasa CM ELRC No.129 of 2019)*

**JUDGMENT**

1. The appeal herein arises from the judgment delivered on 7 November 2021 in Mombasa CM ELRC No.129 of 2019. The background of the appeal is that the appellant was employed by the respondent in November 2012 as a guard and through letter dated 30 September 2017, the respondent informed the appellant that its contract with the client, Postbank was to be terminated with effect from 1<sup>st</sup> November 2017 and hence he would be redeployed. On the due date, he was issued with letter terminating his employment. At the time he was earning a wage of Kshs. 10,500 per month. The claimed in unfair termination of employment and that there was no reason leading to such action and claimed the following dues;
  - a. Notice pay Kshs. 10,500;
  - b. Salary arrears for October/November Kshs. 14,530;
  - c. Compensation Kshs. 126,000;
  - d. Underpayments Kshs. 21,074;
  - e. House allowance from 2012 to 2017 Kshs. 99,486;
  - f. Leave pay from 2012 to 2017 Kshs. 42,403;



- g. Public holidays Kshs. 22,211;
  - h. Overtime Kshs. 315,000;
  - i. Certificate of service; and
  - j. Costs of the suit.
2. In response, the respondent's case before the trial court was that through letter dated 30 September 2017 the appellant was informed to report back to the respondent for redeployment as its contract with Postbank was terminated but he never turned up for allocation of a new work station and there is no refusal to pay terminal dues. the appellant deserted duty without notice and the claims made are not justified.
  3. The learned magistrate analysed the evidence and made a finding that the appellant deserted duty contrary to Section 44(1) and (2) of the *Employment Act*, 2007 and summary dismissal was justified following absenteeism from duty and the claim was dismissed in its entirety.
  4. Aggrieved, the appellant filed the instant appeal on six grounds that the trial court entered judgment in error in the finding that the appellant had deserted duty without a hearing and that he had been directed to report at the Mombasa branch office instead of the head office which he had done. That the respondent did not adduce any evidence to prove that the appellant was served with notice of summary dismissal and the court ought to have assessed the claims made on the merit especially that of unpaid salary, outstanding leave allowance, underpayment, house allowance and unpaid overtime allowances which were pleaded and hence the judgment should be set aside and an order issued allowing the claim with costs.

Both parties attended and agreed to file written submissions.

5. The appellant submitted that on 31 October 2017 the appellant was served with letter dated 30 September 2017 indicating that he would be redeployed from the Postbank site form 1<sup>st</sup> November 2017. He was directed to report at the branch office in Mombasa by his supervisor where he was told that arrangements for his redeployment would be done and he was to wait for a call. The call never came and his efforts to report and seek information was fruitless. He was not issued with the notice filed indicating there was summary dismissal over alleged absenteeism.
6. The letter dated 30 September 2017 did not indicate where the appellant was required to report to for redeployment. The respondent admitted that the appellant was at the office on 7 November 2017. The notice of summary dismissal is dated 8 November 2017 meaning the respondent knew where the appellant was.
7. Alleged desertion of duty is a serious offence which renders the employee liable for summary dismissal as held in *Stephen Karisa Kirao v Kilifi Plantations Limited* [2018] eKLR. It is not sufficient for an employer to state that the employee has deserted duty. Evidence must be called as to what measures were put in place to have the employee attend as required under Section 41(2) of the *Employment Act*, 2007 (the Act). This resulted in unfair termination of employment and notice pay and compensation should be awarded.
8. At the time the appellant was dismissed, his wage was Kshs. 10,500 while a security guard was entitled to Kshs. 12,926.55 under the Minimum Wage Orders, 2016 and the claim for Kshs. 129,265.50 should be awarded as held in *Titus Mutiso Mbidyo v Motor Boutique Limited* [2019] eKLR.
9. The failure to assess the claims pleaded resulted in an erroneous judgment particularly with regard to claim for unpaid salary, leave, underpayments, house allowances and overtime. The respondent called



its witness who testified that they were ready to pay the appellant his terminal dues of Kshs. 182,024.49 through an undated cheque and then alleged that the appellant had refused to attend and collect his dues. This amount corresponds with the tabulation of terminal dues on the clearance form with regard to unpaid salaries for October and November 2017 for 50 days and notice pay of one month. the failure to award what was admitted was erroneous.

10. The unpaid salary should be based on the lawful wage due at Kshs. 12,926.55.
11. The appellant submitted that on the claim for leave days not taken, in the clearance form, the respondent has admitted to owing the appellant 50 days at Kshs. 17,500 but such amount is due for 5 years of service all at Kshs. 42,403.84.  
There were underpayment amounting to Kshs. 21,074.
12. From the year 2012 to 2017 there was no house allowance paid which should be assessed and awarded at Kshs. 93,643.65.
13. Overtime pay is due since the appellant was working for 12 hours in 6 days and in this regard, he is entitled to Kshs. 315,000 together with his costs.
14. In reply, the respondent submitted that through notice dated 30 September 2017, the respondent informed the appellant that its contract with Postbank would terminate with effect from 1<sup>st</sup> November 2017 and he should report to the Nairobi office for redeployment. He failed to report as directed. For desertion of duty, summary dismissal notice issued. He proceeded to return his uniforms to the branch office in Mombasa. The trial court made a correct finding and dismissed the claim and that summary dismissal is allowed under Section 44 of the Act.
15. Section 36 of the Act places the duty to issue notice before terminating employment on the person alleging which the appellant failed to issue before deserting duty and therefore he cannot claim notice pay.
16. Claims for unpaid salary for October/November is part of the terminal dues offered to the appellant while the claims for underpayment, house allowance and overtime are without merit and these were correctly dismissed. In the case of Kudbeiba v Charles Waithaka Goko t/a Apple Bee Pub & Restaurant [2013] eKLR the court held that in a claim for overtime pay, a claimant must make a greater effort in directing the court to a mathematically defensible, legally identifiable and factually credible system of such claim. Without timesheet or a schedule of how overtime arose or the underpayments, the general claims cannot be assessed as held in Stephen Maganga Shungula v Rift Valley Railways (Kenya) Limited [2019] eKLR.
17. The respondent submitted that these claims were continuing injuries and the appellant failed to address them within 12 months within his employment.
18. The claim for leave pay, this is assessed and part of the terminal dues offered while the claim for payment for work during public holidays is without merit.
19. This being a first appeal, the court is allowed to re-evaluate the pleadings, evidence and the entire record to analyse and arrive at own conclusions but taking into account the trial court had the opportunity to hear the parties in court.
20. Issuance of letter dated 30 September 2017 is not contested. This letter was brief and stated that;

Termination of Contract – Postbank



This is to inform you that the contract of Postbank will be terminated with effect from 01 November 2017. Consequently, you are directed to report to the head office immediately for redeployment.

You are our employee and have another assignment for you. ...

21. This letter is addressed to the appellant. Without an address, this must have been by hand. The mode of service is not apparent.
22. The letter is on the letterhead of the respondent, PO Box 18148-00100 Nairobi, Brinks Hse, Othaya Rd, Lavington, Opp. Egyptian Embassy.
23. The letter of summary dismissal is posted to the appellant's address PO Box 29 Ganze.
24. The letter directing report to head office is vague and bares no particular details for the appellant to follow from his work station in Mombasa to Nairobi. Such requirement is not apparent. His home address being Ganze, the directions to have him immediately in Nairobi creates more haziness in this direction.
25. The evidence that the appellant had a local office in Mombasa with a manager and supervisor is not challenged. Where indeed the appellant had such a structure and office in Mombasa as a branch of the respondent, reasons then demanded that such office should and ought to have coordinated the matter and clarified that he was to report to the head office in Nairobi and not Mombasa. Change of office from one region to another that is so far apart and required coverage of long distances of a maximum of 8 hours on the road, proper and specific direction in this regard ought to have issued.
26. In evidence, the appellant testified that his manager told him to go to the Makupa office. He had no dealing with the head office. That he was to be cleared at the Mombasa office.
27. Bernard Chengo Kawea testified in support of the respondent's case that he works for the respondent at the Coast region branch as manager. He issued the appellant with the summary dismissal notice on 8 November 2017.
28. All operations with regard to the appellant's employment were at the Mombasa branch and not the head office. To assertion that the notice dated 30 September 2017 was meant for him to report at Nairobi is just but an effort to escape responsibility.
29. Even in a case where the appellant failed to report at Nairobi as alleged, an employee who is alleged to have deserted work does not dismiss himself form employment. notice to such an employee must issue in terms of Section 41(2) of the Act requiring him to attend and show cause why his employment should not be dismissed. where the employee continues to be absent and fails to respond to the notice, such matter must be reported to the Labour Officer in terms of Section 18(5)(b) of the Act that;
  - (5) Upon the termination of a contract of service—
    - (a) ... ;
    - (b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.



30. The notice to the Labour Officer only issues after the employer has addressed itself with regard to Section 41(2) of the Act that;
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
31. These provisions are mandatory. These provisions are given emphasis in the case of Ayub Kombe Ziro v Umoja Rubber Products Limited [2022] eKLR where the court held that the employer has the duty to prove that the employee was issued with notice and he failed to attend. To allege work desertion is not enough on its own. 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.
32. Without the mandatory notice, to issue notice of summary dismissal resulted in unfair termination of employment. The trial court reached this verdict but went ahead to find the summary dismissal notice issued lawfully. The contradiction noted, the appellant is entitled to notice pay and compensation for unfair termination of employment in terms of section 45 and 49 of the Act.
33. In the tabulation of terminal dues, the respondent offered the appellant Kshs. 182,024.90. This much the trial court ought to have confirmed.
34. This comprised the following;
- a. October 2017 salary Ksh. 7,066.67;
  - b. November 2017 salary Ksh.136.67;
  - c. Leave pay for 2015 and 2016 at 50 day Ksh. 17,500;
  - d. Uniform returned Ksh. 2,400; and
  - e. Notice pay Ksh. 10,500;
35. Notice pay is due based on the last lawful wage the appellant was entitled to under the Wage Orders at Kshs. 12,926.55 + 15% house allowance total due is Kshs. 14,865.50 in notice pay less what was paid at Ksh. 10,500 = Kshs. 4,365.50.
36. The appellant worked for the respondent from the year 2012 to 2017 without any record for the 5 years. He was willing to work until the unfair termination of employment. Compensation is hereby awarded at 5 months' gross wage of Kshs. 14,865.50 x 5 all at Kshs. 74,327.66.
37. On the claims made, upon the finding by the trial court that employment terminated lawfully, which is addressed above that this was erroneous, the other pleaded dues were not gone into.
38. All claims made by an employee should be addressed on the merits in terms of Section 18(4) of the Act;
- 4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal.



39. The claims for unpaid salary, untaken leave days, underpayments, house allowances and overtime should have been gone into and addressed on the merits.
40. Whatever reason(s) are given resulting in termination of employment, for days worked, the employee's due wages are a lawful claim and should be awarded.
41. The appellant had pleaded for salary for October/November at Kshs. 14,530. In the appeal, this claim changed to Kshs. 17,500. In tabulating final payments, there is pay for October and November 2017.
42. Underpayments are claimed at underpayments Kshs. 21,074. This claim is not challenged in any material way. Indeed, the wage paid of Kshs. 10,500 is below the minimum wage due to the appellant at Kshs. 12,926.55 the difference of Kshs. 2,426.55 and a basic analysis for September and October 2017, there is an underpayment of the basic wage by Kshs. 4,853.10. coupled with the due house allowance on the basic wage at 15%, the gross wage due to the appellant ought to have been Kshs. 1,938 + 12,926.55 = Kshs. 14,866.50.
43. On the claim for house allowances and overtime from the year 2012 to 2017, the appellant ought to have given a breakdown of his wages over time vis-a-vis the Wage orders to allow the court undertake a correct analysis and appropriate award. Without these particulars, the claim for Kshs. 99,486 is not given a foundation.
44. Leave pay is due in lieu of the employee taking annual leave in terms of Section 28 of the Act. The employer should keep work records in this regard in terms of Section 10(6) and (7) of the Act. Save, leave days should not be accumulated outside the provisions of Section 28(2) of the Act and for the last two years of employment, the appellant was entitled to 21 days of annual leave each year all 42 and based on the basic wage of Kshs. 12,926.55. In the payment of final dues, the employer allocated Ksh. 17,500 in leave pay which is sufficient.
45. A claim for pay for work during public holidays is not given a basis. Public Holidays are not general. These are gazetted days each year. The general claim without particulars cannot be awarded.
46. A Certificate of Service is a legal right under Section 51 of the Act. this should issue whatever the reasons leading to termination of employment. The respondent's witness Mr Kyengo testified to the fact that the appellant was cleared. His Certificate should issue.
47. The appeal is largely successful and on the claim for costs, the appellant shall be awarded 50% of Costs due in the appeal.
48. Accordingly, judgment of the trial court in Mombasa CM ELRC No.129 of 2019 is hereby reviewed with a finding that the appellant's employment terminated unfairly and the following awards are hereby issued;
  - a. The offered amount of Kshs. 182,024.90 is hereby confirmed and shall be paid if not already acknowledged;
  - b. Compensation awarded at Kshs. 74,327.66;
  - c. Difference in notice pay Kshs. 4,365.50;
  - d. leave pay Kshs. 17,500;
  - e. certificate of service shall issue;
  - f. the appellant is awarded 50% costs of the appeal.



**DELIVERED IN OPEN COURT AT MOMBASA THIS 30<sup>TH</sup> DAY OF OCTOBER 2023.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

Court Assistant: Japhet Muthaine

..... and .....

