



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Gharal v Mageni (Appeal 191 of 2022)**  
**[2023] KEELRC 3084 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3084 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**APPEAL 191 OF 2022**  
**J RIKA, J**  
**NOVEMBER 30, 2023**  
**[FORMERLY NAIROBI H.C.C.A NUMBER E760 OF 2022]**

**BETWEEN**

**SWARAN SINGH GHARAL ..... APPELLANT**

**AND**

**PETER KHADERA MAGENI ..... RESPONDENT**

*(An Appeal from the Judgment of the Hon. Principal Magistrate Hon, Edgar Kagoni delivered at Nairobi on 23rd September 2022 in Republic of Kenya in the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts Civil Case Number E1054 Of 2020)*

**JUDGMENT**

Rika J

Court Assistant Emmanuel Kiprono.

Ochieng' Achach & Kaino Advocates for the Appellant

1. Following the Judgment of the Hon. Principal Magistrate indicated above, the Appellant filed a Memorandum of Appeal dated 28<sup>th</sup> September 2022.

**Appeal.**

2. There are 6 Grounds to the Memorandum: -
  - a. The Trial Court erred in concluding that termination of the Respondent's contract was unfair and unlawful.
  - b. The Trial Court erred by awarding the Respondent maximum compensation.



- c. The Trial Court erred by awarding the Respondent damages for wrongful dismissal.
  - d. The Trial Court erred by awarding the Respondent overtime pay.
  - e. The Trial Court erred by awarding the Respondent holiday pay.
  - f. The Trial Court erred by awarding the Respondent the prayers sought.
3. The Appellant prays that: -
- a. The Appeal is allowed.
  - b. Judgment entered in favour of the Respondent is set aside and replaced with an order dismissing the Claim.
  - c. Such other suitable order.
  - d. Costs.

### **Cross-Appeal**

4. The Respondent filed a Cross-Appeal dated 4<sup>th</sup> April 2023. The grounds are: -
- a. The Trial Court erred by failing to consider the length of service, in awarding the Respondent 4 months' salary in compensation for unfair termination.
  - b. The Trial Court erred in failing to award the Respondent notice pay.
  - c. The Trial Court erred in failing to award the Respondent gratuity in accordance with Regulation 17, Regulation of Wages [Protective Security Services] Order.
  - d. The Trial Court erred in failing to consider the Respondent's submissions.
  - e. The Trial Court erred in failing to consider the evidence adduced by the Respondent.
5. The Respondent proposes that the Appeal is dismissed and he is awarded by way of Cross-Appeal: -
- a. Damages equivalent of 12 months' salary.
  - b. Notice pay.
  - c. Service gratuity.

### **The Claim**

6. The Claim before the Trial Court was that the Claimant [now Respondent], was employed by the Respondent [Appellant] as a Security Guard, in January 2008. He was alleged to have conspired with a Caretaker, to claim the wages of a Guard, who had never reported to work. The Appellant allegedly heard him and in the end, issued a notice of termination of 30 days. He asked the Trial Court to declare that termination was unfair and unlawful and grant to him: -
- a. Maximum compensation for unfair termination.
  - b. 1-month salary in lieu of notice.
  - c. Damages for wrongful dismissal.
  - d. Overtime.



- e. Public holiday pay.
- f. Service gratuity.
- g. Certificate of Service.
- h. Costs.
- i. Interest.
- j. Any other suitable relief.

### **Judgment**

- 7. The Trial Court granted: -
  - a. Declaration that termination was unfair and unlawful.
  - b. Notice pay declined.
  - c. 4 months' damages at Kshs. 69,652.
  - d. Holiday pay, at Kshs. 117,237.
  - e. Overtime pay at Kshs. 831,246.  
Total...Kshs. 1,081,135.
  - f. Interest at court rate from the date of Judgment.
  - g. Service gratuity declined.
  - h. Award subject to statutory deductions.
  - i. Certificate of Service to issue.
  - j. Costs to the Claimant.

### **Appellant's Submissions**

- 8. The Appellant submits that the Trial Court found the Appellant had just cause, in terminating the Respondent's contract, as shown at page 82 paragraph 5 of the Record of Appeal. The Respondent was issued 1-month notice, and paid 1-month salary in lieu of notice, and the Appellant then proceeded to terminate the Respondent's contract instantaneously, for gross misconduct. There was valid reason to justify termination under Section 43 of the Employment Act. Procedure was fair under Section 41 of the Employment Act. Several warnings had issued to the Respondent, with apology tendered by the Respondent, with an assurance not to repeat the offences.
- 9. The Appellant submits that overtime was miscalculated, and ought to have been Kshs. 103,960. Holiday pay was similarly miscalculated, and ought to have been Kshs. 17,716.

### **Respondent's Submissions**

- 10. The Respondent submits that he was not issued a letter to show cause. There was no evidence of a disciplinary hearing at the Trial Court. The shelf life of warning letters relied upon by the Appellant was 1 year. The Appellant did not establish valid reason to justify termination.



The Respondent merited to be paid equivalent of 12 months' salary in compensation, having worked for more than 11 years.

11. On overtime, the Respondent submits that he adduced evidence showing he worked from 6.00 a.m. to 6.00 p.m. There was no dispute on the hours. The Trial Court found that there was no evidence challenging the prayer for overtime pay. The challenge on the mode of calculation, submitted on Appeal is fresh submission. It was not made in the Appellant's pleadings, evidence or submission at the Trial Court. The Respondent submits at paragraph [w] of his submissions dated 17<sup>th</sup> September 2023, that the total overtime pay was Kshs. 389,850.
12. He submits that the Appellant did not raise objection during the trial, to the prayer for holiday pay, on the ground stated on Appeal. It was not contested that the Respondent worked on public holidays.
13. He submits further that he prayed for gratuity at Kshs. 84,386, based on Regulation 17 of the applicable Regulation of Wages [Protective Security Services] Wage Order. Gratuity ought not have to be denied to the Respondent, on the basis of his registration to the N.S.S.F.

#### **The Court Finds:-**

14. Ground 1 of the Appeal. The Court does not find fault with the Trial Court's declaration that termination was unfair and unlawful. RW1 conceded that there was no evidence to show that the Respondent was granted an opportunity to defend himself. There was no evidence of a disciplinary hearing. While the Trial Court was persuaded that termination was based on valid reason, it correctly found that procedure was flawed, and termination therefore unfair under Section 41 of the *Employment Act*. There was nothing wrong in the Trial Court's declaration that termination was unfair and unlawful.
15. Ground 2. The Judgment appealed against does not support Ground 2. The Trial Court did not award maximum compensation for wrongful dismissal. Paragraph [c] of the orders in the Judgment, indicates that the Respondent was awarded compensation, equivalent of 4 months' salary amounting to Kshs. 69,652. This cannot have been the maximum compensation awardable under the *Employment Act*, which is equivalent of 12 months' gross salary.
16. Ground 3. This is a rehash of Ground 2. It states that the Trial Court erred in awarding damages for wrongful dismissal. There was no error in making an award for compensatory damages equivalent of 4 months' salary, the Trial Court having declared correctly, that termination was unfair and unlawful.
17. Ground 4. The Court agrees with the Respondent, that the Respondent was entitled to overtime pay. The Appellant does not dispute entitlement of overtime pay, but disputes its computation. There is considerable doubt, whether the amount awarded by the Trial Court, reflected a correct assessment of overtime work payable. Whereas the Appellant did not challenge the calculations submitted by the Respondent on the grounds advanced on Appeal, there is doubt in the mind of the Court, arising from the calculations contained in the Parties' submissions, whether indeed the astronomical sum of Kshs. 831,246 awarded by the Court as overtime pay, reflected a correct and fair compensation for overtime work actually carried out by the Respondent.
18. The figure was based on a calculation of overtime for May 2015 to April 2017 at Kshs. 332, 640; May 2017 to April 2018 at Kshs. 187, 273; and May 2018 to September 2019, at Kshs. 311, 344. The Respondent's monthly salary was Kshs. 15,142. His annual salary would be Kshs.



181,704. How did he earn overtime of Kshs. 311,344, in a period of 1 year, 5 months, between May 2018 to September 2019? These figures were grossly inflated, even to the naked eye, and should not have been endorsed by the Trial Court.

19. There were inconsistencies in the Respondent's own calculations in his submissions. At paragraph [w] of his submissions, he states that the total overtime sum is Kshs. 389,850. The amount from May 2018 to September 2019 is quoted at Kshs. 130, 650. From May 2017 to April 2018, the Respondent submits he was owed overtime at Kshs. 86,400. The figures have been revised down. These fresh figures are shown at paragraph [w] of the Respondent's submissions, and do not support the award of Kshs. 831,246, made by the Trial Court in overtime.
20. The Appellant submits that the correct overtime pay should have been Kshs. 103,060. He does not in principle, fault the award of overtime pay, but gave no evidence to challenge the Respondent on trial, in his calculation of overtime pay. Based on the calculations submitted by the Respondent however, the Court does not think it is safe to sustain the sum awarded by the Trial Court as overtime pay, and substitutes that sum with the sum of Kshs. 389,850, given as the revised total of overtime pay by the Respondent in his submissions.
21. Ground 5. The same argument advanced by the Appellant against award of overtime, is repeated on holiday pay. The Appellant brings in fresh arguments which were never in issue at the trial, on computation of holiday pay. This Ground has no merit.
22. Ground 6. This is a generalization. It is not targeted on specific issue, but alleges that the Trial Court erred, in granting the Claimant the prayers sought. How is the Court to make a finding on a general statement faulting the entire Judgment? There is a reason why procedural rules require Appellants to state specific ground of appeal. The generalized ground has no foundation.
23. On the Cross-Appeal, Ground 1, the Respondent faults award of compensation at equivalent of 4 months' salary. His argument is that he had worked for over 11 years, and the award did not reflect his length of service. The Court notes that termination was found to have been based on valid reason, but faulted on procedure. Longevity of service was not the sole determinant under Section 49 of the Act, in assessing the amount of compensation payable. It is a hugely significant factor for instance, if the Employee's conduct caused, or contributed to termination. This factor has analogy in personal injury claims, where there is a concept of contributory negligence, resulting in shared liability. If an Employee has caused, or contributed to termination, he has no reason to expect the Employer to shoulder 100% liability for the decision to end the employment relationship. There are other equally weighty factors, beyond the length of service. The Respondent having conducted himself in a manner which caused or contributed to termination, cannot complain that equivalent of 4 months' salary in compensation for unfair termination was too low, and that he should have been awarded the ceiling of 12 months' salary. If he had not engaged in misconduct which the Trial Court found, amounted to just cause, he would not have left employment.
24. Ground 2. The claim here is that the Trial Court erred in denying notice pay. Evidence before the Trial Court is that the Respondent was granted a notice of 30 days. There was no requirement to pay him notice, once a written notice of termination issued. The Appellant however, appears to have had no clarity of mind, on the mode of termination, submitting that he issued 1-month notice; paid 1-month salary in lieu of notice; and terminated the Respondent's contract instantaneously. Once notice has issued, it is illogical to allege that 1-



month salary has been paid, in lieu of the same notice. If notice had issued, or been paid, it cannot have been that termination was instantaneous, which is another way of saying there was summary dismissal, defined under Section 44[1] of the *Employment Act*, as termination without notice, or with less notice than is merited under contract or statute. The Appellant's submission on the mode of termination is muddled, but the Trial Court, having concluded that notice issued, did not err in declining notice pay. Alternatively, there was valid reason warranting summary dismissal, which would disentitle the Respondent notice or notice pay. The Ground has no merit.

25. Ground 3. This is on the Trial Court's refusal to award gratuity under Regulation 17 of the Regulation of Wages, [Protective Security Services] Wages Order. Whereas the Court does not agree that the Respondent would be disentitled to gratuity by dint of his subscription to the N.S.S.F, Regulation 17 states that an Employee who is summarily dismissed for lawful cause, or who terminates his services for any other reason other than certified ill-health or retirement age, shall not be entitled to gratuity. The Respondent's contract was terminated for lawful cause, and it was moot, whether he was registered to the N.S.S.F; he was not entitled to gratuity under Regulation 17, having left employment for lawful cause. Gratuity did not accrue as a matter of right after the Respondent clocked in excess of 5 years of service, as he submits. If he left service on summary dismissal, for lawful cause, he lost gratuity, regardless of the number of years served. Ground 4 of his Cross-Appeal is declined alongside Ground 3.
26. Grounds 5 and 6, allege that the Trial Court failed to take into account the submissions and evidence of the Respondent. The record indicates that the Trial Court considered submissions and evidence adduced by both Parties, and reached its findings based on such submissions and evidence. There is no merit to these Grounds.

**It is Ordered: -**

- a. The Appeal is partly allowed on Ground 4, and the overtime amount due to the Respondent, revised down to Kshs. 389,850.
- b. The Cross-Appeal is declined.
- c. No order on the costs on Appeal.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**JAMES RIKA**

**JUDGE**

