



REPUBLIC OF KENYA



**Riley Falcon Security Services v Adhiambo (Appeal E002 of 2022)  
[2023] KEELRC 3087 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3087 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E002 OF 2022  
CN BAARI, J  
NOVEMBER 30, 2023**

**BETWEEN**

**RILEY FALCON SECURITY SERVICES ..... APPELLANT**

**AND**

**JOYCE ADHIAMBO ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. S. N. TELEWA (SRM)  
delivered on 8th December, 2021 in Kisumu CMELRC NO. 143 OF 2019)*

**JUDGMENT**

1. Before Court is an appeal against a judgment delivered on 8<sup>th</sup> December, 2021, where the Trial Court entered judgment in favour of the Respondent and made an award of one-month salary in lieu of notice, damages for wrongful and unfair termination, house allowance, salary underpayment and costs of the suit.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 26<sup>th</sup> January, 2022.
3. The appeal is premised on the grounds That:
  - i. The Learned Magistrate erred in law and fact in finding that the Claimant had been unlawfully dismissed from employment when there was no evidence to support the said termination. The mixed reference to 'dismissal' and termination meant that the Learned Magistrate did not appreciate the issue that was before her for determination.
  - ii. The Learned Magistrate erred in law and fact in failing to find that the Claimant's contract had lapsed by effluxion of time and hence, it would have been impossible for the Appellant to terminate the Claimant from employment.



- iii. The Learned Magistrate erred in law and fact by wholly ignoring the uncontroverted evidence that the Claimants' employment was governed by a contract between parties, and as such, parties were bound by the terms of the said employment contract.
  - iv. The Learned Magistrate erred in law and fact in finding that the Respondent's termination was on the basis of redundancy.
  - v. The Learned Magistrate erred in law in awarding the Claimant the sum of Kshs. 14,865.36 being one-month salary in lieu of notice whereas, there was no basis to make the award in view of the evidence presented before court.
  - vi. The Learned Magistrate erred in law and fact by awarding the exorbitant sum of Kshs.178,386.36 as twelve (12) months compensation for wrongful and unfair termination, whereas, there was no basis to make the award in view of the evidence presented before the Court.
  - vii. The learned Magistrate erred in making an award to the Claimant for house allowance and underpayments notwithstanding that the said claims had been paid by the Appellant to the Claimant in full as per the evidence on record.
  - viii. The Learned Magistrate erred in law in making awards for house allowance and underpayment based on statute barred claims.
  - ix. The Learned Magistrate erred in law and in fact in disregarding the submissions made and filed by the Appellant in arriving at judgment in the case.
4. The Appellant prays that this appeal be allowed and the Judgment of the subordinate Court be set aside, and be substituted with a Judgment dismissing the Respondent's suit in the subordinate court.
  5. The Appellant further prays that it be awarded the costs of this appeal as well as those of the suit in the subordinate court.
  6. Submissions on the appeal were filed for both parties.

### **The Appellant's Submissions**

7. It is the Appellant's submission that Section 40(1) (f) of the *Employment Act*, specifically indicates that where an employee had been declared redundant, the employee is entitled to one month's pay in lieu of the redundancy notice. The Appellant further submits that the Respondent herein, was not declared redundant and neither was there any evidence before the Trial Court that the termination of the Respondent from employment was due to redundancy. The Appellant submits that the reliance by the Trial Court on the decision in Kenya Airway Limited Versus Aviation and Allied Workers Union Kenya and 3 others on issuance of a general notice was wrong.
8. The Appellant submits that the Trial Court misdirected herself by reaching a finding that it was under an obligation to inform the Respondent of its intention not to renew the contract, on the basis that a fixed term contract has a definite start date and an end date. It is the Appellant's further submission that the Respondent's contract came to an end on 28<sup>th</sup> February, 2019, and there was no requirement for the Appellant to inform the Respondent that her contract was about to end or that her contract had ended. Reliance was placed on the decision of Rika J in *Bernard Wanjohi Muriuki Versus Kirinyaga Water and Sanitation Company Limited & Another (2012)*.
9. The Appellant submitted that the Trial Court erred in awarding the Respondent one month salary in lieu of notice and damages for wrongful termination, when the Respondent's contract came to an



end as per the employment contract, and there was no need to issue any notice to that effect and that she was never terminated.

10. It is The Appellant's Submission that the Trial Court did not give any reasons as to how it arrived at the decision to award the Respondent House Allowance for Kshs. 61,248.40. It is the Appellant's further submission that the claims in respect of house allowance were time barred as per Section 90 of the *Employment Act*. The Appellant sought to rely in *Josephat Ingosi Andulu v. Nightingale Rukuba (2014)* to support this position.
11. It is the Appellant's submission that it proved that the Respondent was indeed paid her house allowance which was included in her pay slips.
12. The Appellant submits that the Trial Court did not give reason (s) for its finding on underpayment, for which it made an award of Kshs.278,840.30. It is the Appellant's further submission that the claims of underpayment between 2009 to 2017 were statute barred, while those for the period between 1<sup>st</sup> September, 2018 to 28<sup>th</sup> February, 2019, the Respondent did not produce any evidence on what the daily wage for a security guard within Kisumu County for the period claimed was.
13. The Appellant finally submits that this appeal be allowed, and the decision of Honourable S. N Telewa delivered on 8<sup>th</sup> December, 2021 be set aside and the suit in the Lower Court be dismissed with cost to the Appellant.

### **The Respondent's Submissions**

14. It is the Respondent's submission that the provisions of Section 40 (1) (f) of the *Employment Act*, was flouted with regard to notice which goes to the root of procedural fairness, and which was not followed.
15. The Respondent submits that Section 45 (2) (c) of the *Employment Act*, 2007, demarcates that a termination not in accordance with fair procedure is unfair. It is further submitted that Section 45(4) (b) enjoins the Appellant to act with justice and equity to ensure that no employee is terminated unfairly.
16. The Respondent submits that the Courts have interpreted these provisions and concluded that a fair termination procedure entails issuing a notice or payment in lieu of such notice, when the employer intends to declare an employee redundant.
17. It is The Respondent's Submission that the award of 12 months as compensation for wrongful and unfair termination, was thus justified on the basis that the Respondent had worked for the Appellant for close to 9 years with an expectation to continue doing so, and therefore the Trial Court exercised its discretion fairly.
18. The Respondent submits that there was no procedural fairness in the manner in which the Respondent's contract was terminated, and the Trial Court was right in finding that the dismissal was unfair and commuting the same to redundancy for which notice ought to issue.
19. The Respondent urges that the court dismisses the appeal 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 -
  - i. The Learned Magistrate erred in law and fact in finding that the Claimant had been unlawfully dismissed from employment when there was no evidence to support the termination.



- ii. The learned Magistrate erred in making award to the Claimant for salary in lieu of notice, damages for unfair termination, house allowance and salary underpayments.
21. 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”
22. My jurisdiction as a first Appellate Court is to reappraise the evidence adduced before the Trial Court in its entirety and make my own conclusion. (See *Selle & Ano. Vs. Associated Motor Boat Co. Ltd (1968) EA 123*)
23. The Trial Court’s finding is that the Respondent was unfairly terminated on the premise that the Appellant did not adhere to procedures on declaration of redundancy. The Appellant on their part submit that the Respondent’s employment terminated by effluxion of time her fixed term contract having lapsed on 28<sup>th</sup> February, 2019.
24. Indeed, the Respondent had a six months employment contract with the Appellant, and which was to lapse on the 28<sup>th</sup> of February, 2019. The record however shows that the Respondent continued to work until 13<sup>th</sup> March, 2019, when she fell ill and sought treatment, and upon resuming duty, the Appellant did not assign her any duties.
25. The *Employment Act* defines redundancy as loss of employment, occupation, job or career by involuntary means through no fault of the employee, and it involves termination at the initiative of the employer where the services of an employee are not needed or through practices such as abolition of office. The circumstances leading to the Respondent’s separation with the Appellant, do not support a redundancy situation.
26. I thus find and hold that the Trial Court erred in holding that the Respondent was declared redundant.
27. The question then that begs answer is whether the Respondent was terminated, whether the termination was unfair, or whether her employment terminated by effluxion of time.
28. The Court of Appeal in *Registered Trustees of the Presbyterian Church of East Africa & Another vs. Ruth Gathoni Ngotbo [2017]* eKLR had this to say on fixed term contracts:

“Bearing the foregoing in mind, we note that fixed term contract carries no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent’s contract ought not to have been maintained. This is in relation to the salary for the months 5<sup>th</sup> of April up to May, 2010. Similarly, since the respondent’s contract came to an end by effluxion of time any claim for wrongful termination could not be maintained.”
29. It is not disputed that the Respondent was in the service of the Appellant from August, 2010 to 13<sup>th</sup> March, 2019. It was also agreed that the Respondent served under various fixed term contracts, which were continuously renewed up until September, 2019. The question then, is whether the Respondent’s contract that lapsed on 28<sup>th</sup> February, 2019, carried expectation for renewal.



30. In the South African case of SA Rugby (Pty) Ltd v CCMA & others (2006) 1 BLLR 27 (LC), the Labour Court held thus:

“For an Employee to establish a reasonable expectation of renewal of a contract, the employee was required to establish the following:

- a. A subjective expectation that the Employer would renew the contract on the same or similar terms;
- b. That the expectation must have been reasonable; and
- c. The Employer did not renew the contract or offered to renew it on less favourable terms.”

31. In the case of Keen Kleeners Limited v Kenya Plantation and Agricultural workers' Union (Civil Appeal 101 of 2019) [2021] KECA 352 (KLR) (17 December 2021) (Judgment) the Court relied on the decision in Mediterranean Woollen Mills (Pty) Ltd. v South African Clothing and Textile Workers' Union (143/96) [1998] ZASCA 11, where the Supreme Court of Appeal of South Africa held: -

“That despite a clause of a fixed term contract stipulating that no reasonable expectation for renewal of the contract could arise from the contract, a reasonable expectation could arise where assurances made by the employer and other conduct by the employer led the employees that they could entertain such an expectation.”

32. In my view, the Appellant having renewed the Respondent's contract even when it was christened 'fixed term' continuously for close to ten years, coupled with the nature of the Respondent's employment, leads me to the conclusion that the Respondent has proved that the Appellant had created reasonable expectation that the contract will continue to be renewed.

33. By this expectation, it is my further view that the Appellant was under obligation to issue notice of non-renewal of contract to the Respondent once it decided that it would not renew the Respondent's contract.

34. In the same breath, the failure by the Appellant to issue notice of non-renewal, renders the Respondent's termination unfair, and I so hold.

35. On whether the awards made by the Trial Court are within the law, I will address each award made, and make my own findings on whether the awards should stand.

### **One-month Salary In Lieu Of Notice**

36. The Respondent was terminated unfairly on account of failure by the Appellant to issue notice of non-renewal of contract. This is confirmation that no notice was issued, and which entitles the Respondent to the award of one month salary in lieu of notice and the award by the Trial Court on this account is hereby upheld.

### **Damages For Wrongful And Unfair Termination**

37. The Respondent's termination has been found to be unfair on account of the Appellant's failure to issue notice of non-renewal of contract. This finding entitles the Respondent to compensation.

38. The Trial Court awarded the Respondent 12 months' salary in damages for the unfair termination. In [\*Kenya Broadcasting Corporation v Geoffrey Wakio \[2019\]\*](#) eKLR the Court pointed out that an award



of the maximum of 12 months pay, must be based on sound judicial principles, and that the Trial Judge must justify or explain why a Claimant is entitled to the maximum award.

39. The Trial Court did not give reason(s) for the maximum award contrary to the express provisions of the law under Section 49(4) of the *Employment Act*, 2007.
40. In my view, the Respondent having served to the end of her contract at the time of termination, there was no reasonable expectation as to the length of time for which her employment with the Appellant might have continued, but for the termination.
41. In the premise, I find and hold that the Respondent has not proved a case for maximum compensation, and I deem an award of four (4) months' salary sufficient compensation for the unfair termination.

#### **House Allowance**

42. The pay slips produced in evidence are prove that the Respondent was paid house allowance through out her employ with the Appellant. The ward on this account is unjustified, and is hereby set aside in its entirety.

#### **Underpayment**

43. The Trial Court awarded the Respondent a total of Kshs. 278,840.30/- on account of salary under payment.
44. The Appellant's contention is that the claims of underpayment between 2009 to 2017 were statute barred, while those for the period between 1<sup>st</sup> September, 2018 to 28<sup>th</sup> February, 2019, the Respondent did not produce any evidence on what the daily wage for a security guard within Kisumu County for the period claimed was.
45. The Respondent's claim before the Lower Court was filed in September, 2019. The only part of this claim that is valid, is that from September, 2017. I thus agree with the Appellant that the rest of the claim for underpayment was statute barred by dint of Section 90 of the *Employment Act*.
46. In the upshot, the Appellant's appeal partly succeeds, and orders granted as follows: -
  - i. The award of one-month salary in lieu of notice is upheld at Kshs. 14,865.53/-
  - ii. The award of 12 months' salary is set aside and substituted with an award of Four (4) months' salary as compensation for the unfair termination at Kshs.59,462.12/-
  - iii. The award of house allowance is set aside in its entirety.
  - iv. The award of Kshs. 278,840.30 on account of under payment is set aside and substituted with an award of Kshs. 86,053.72/-
  - v. The Appellant will bear half the costs of the suit before the lower court, and each party will bear their own costs of this appeal.

47. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**



**Appearance:**

Ms. Anuro h/b for Ms. Oduor for the Appellant

N/A for the Respondent

Erwin Ongor - Court Assistant.

