



**Onyango v Riley Falcon Security Services Ltd (Appeal E043 of 2023)
[2023] KEELRC 3037 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3037 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E043 OF 2023
S RADIDO, J
NOVEMBER 29, 2023**

BETWEEN

WILLIAM ONYANGO APPELLANT

AND

RILEY FALCON SECURITY SERVICES LTD RESPONDENT

*(Being an Appeal from the judgment and decree of Honourable C.N.C.
Oruo delivered on 27 June 2023 in Winam ELRC Cause No. E001 of 2022)*

JUDGMENT

1. William Onyango (the Appellant) sued Riley Falcon Security Services Ltd (the Respondent) before the Principal Magistrate alleging unfair termination of contract, breach of contract and unfair labour practices.
2. In a judgment delivered on 27 June 2023, the Principal Magistrate dismissed the Appellant's claim for failing to meet the requisite standard of proof.
3. The Appellant was dissatisfied and he lodged a Memorandum of Appeal with the Court on 2 August 2023 contending:
 - (i) The learned trial Magistrate erred in law and, in fact, by failing to distinguish that the statutory remedies for underpayment and overtime were distinct from the remedies available for the Appellant due to unfair termination.
 - (ii) The learned trial Magistrate erred in law and fact when he failed to appreciate that the Appellant's termination was unfair for want of procedure and substance.
 - (iii) The learned trial Magistrate erred in law and, in fact, by failing to understand that the alleged disciplinary proceedings were conducted in a language that the Appellant did not fully understand, hence the whole process was flawed ab-initio.



- (iv) The learned trial Magistrate erred in law and, in fact, by failing to appreciate that the Respondent did not meet the threshold for substantive fairness to warrant summary dismissal.
 - (v) The Learned trial Magistrate erred in fact and in law by placing on the Appellant's shoulder a heavier burden of proving his case compared to the required standard of a balance of probabilities.
 - (vi) The learned trial Magistrate erred in law and, in fact, by failing to accord the requisite consideration to the Appellant's evidence and submissions filed on record thereby arriving at a wrong finding.
4. The Appellant filed a Record Appeal on 26 September 2023, and the Court gave directions on 5 October 2023.
 5. The Appellant filed his submissions on 12 October 2023, and the Respondent filed its submissions on 3 November 2023.
 6. The Court has considered the Record of Appeal and submissions.

Role of the Court on First Appeal

7. This being a first appeal, the Court is enjoined to re-evaluate the evidence before the trial Court and make its own findings on the evidence and facts, but conscious that it did not see the witnesses.

Unfair Termination of Employment

8. Section 47(5) of the *Employment Act*, 2007 places an obligation on the employee to show at the first instance that an unfair termination of employment occurred.
9. In the Statement of Claim, the Appellant outlined the particulars of unfairness which infected his dismissal, amongst them that he was not shown the cctv footage evidence of the incident in question, he was not allowed to respond to the allegations, no witness was called for interrogation and that he was arm-twisted to accept the allegations.
10. The Respondent issued a charge sheet to the Appellant on 31 March 2021 setting out the allegations to confront. The Appellant was requested to make a written response which he did after which he was invited to an in-person hearing.
11. The invitation informed the Appellant of the right to attend the hearing with a colleague of his own choice and he was accompanied by a colleague guard.
12. The Appellant signed the minutes of the hearing.
13. The Appellant did not indicate in the minutes that he had been arm-twisted. In the filed witness statement which was adopted as part of the evidence, the Appellant did not disclose the name of the person who arm-twisted him.
14. The minutes also do not capture the Appellant as complaining about the language of the disciplinary hearing. The Appellant's written response to the show-cause was in English. The Appellant did not disclose who wrote for him the response.
15. Considering the evidence placed before the Principal Magistrate, the Court is satisfied that the process leading to the dismissal of the Appellant was fair and that the Principal Magistrate did not fall into an error of law or fact in finding that he had not meet the standard of proof.



Breach of Contract

Underpayments

16. The Appellant advanced a cause of action for underpayments from 2010 to 2018.
17. The Principal Magistrate did not address his mind to this head of the claim. The Court finds that this was an error of law and fact.
18. However, the Court notes that the Cause was filed on 10 January 2022 more than 3 years after separation.
19. The claims for underpayment were, therefore, caught up by the law of limitation as prescribed by section 90 of the *Employment Act, 2007*

Overtime

20. On account of overtime, the Appellant prayed for Kshs 193,908/-.
21. The Principal Magistrate did not address this distinct cause of action for breach of Contract/statute and that was an error of both law and fact.
22. The Appellant testified that he used to work 12 hours a day instead of the stipulated 8 hours.
23. The Respondent denied that the Appellant worked overtime. Its witness testified that the Appellant was usually on call and that any overtime worked was compensated.
24. Copies of the pay slips produced in Court by the Appellant indicated that overtime work was compensated.
25. Without any further corroborative evidence, the Appellant did not lay a sufficient evidentiary foundation to this head of the claim as his evidence showed payment for overtime work.

Gratuity

26. The Appellant sought for payment of gratuity and he relied on Regulation 17 of the *Regulation of Wages (Protective Security) Services Order, 1998*.
27. The Respondent resisted the claim on the basis that the Appellant was a contributor to the National Social Security Fund, and was thus not eligible for gratuity by virtue of section 35(5) and (6) of the *Employment Act, 2007*.
28. The Appellant was dismissed. The Court found that the dismissal was fair and by operation of Regulation 17(2) of the *Regulation of Wages (Protective Security) Services Order, 1998*, he would not be eligible for gratuity.

Certificate of Service

29. A Certificate of Service is a statutory entitlement and if the Respondent did not issue one to the Appellant, it should within 30 days.



Conclusion and Orders

30. From the foregoing, save for an order directing the Respondent to issue a Certificate of Service to the Appellant and despite the errors of law and fact noted by this Court, the Court finds no merit or reason to set aside or vacate the judgment of the Principal Magistrate.
31. The Appeal is dismissed with no order on costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 29TH DAY OF NOVEMBER 2023.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances:

For Appellant Omondi Otieno & Associates

For Respondent Owiti, Otieno & Ragot Advocates

Court Assistant Chrispo Aura

