



**Ouru v Eveready Security Guards Co. Ltd (Appeal 38 of 2020)
[2023] KEELRC 3049 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3049 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 38 OF 2020
JK GAKERI, J
NOVEMBER 29, 2023**

BETWEEN

OURU VINCENT OURU APPELLANT

AND

EVEREADY SECURITY GUARDS CO. LTD RESPONDENT

JUDGMENT

1. This is an appeal from the judgement of Hon. A. M. Obura (Mrs) SPM delivered on 15th May, 2020 at Nairobi in CMEL Case No. 1254 of 2019 Ouru Vincent Ouru V Eveready Security Guards Co. Ltd.
2. The background of the case is that by a Memorandum of Claim dated 18th July, 2019, the Claimant/Appellant sued the Respondent for unlawful termination of employment and prayed for one month's salary in lieu of notice, 12 months compensation, leave days and leave travelling allowance, overtime at 20 hours per week, rest day, public holidays, house allowance at 15%, service gratuity, certificate of service, costs of the suit and interest.
3. The Claimant alleged that he worked for the Respondent from April 2018 to 6th June, 2019 at Kshs.15,000/= per month working from 6 pm to 6.00 am with no off-days, leave or leave allowance and worked during public holidays.
4. That on instructions of the supervisor on 5th June, 2019, he proceeded to the office on 6th June, 2019 where the General Manager, Mr. Machira terminated his employment and confiscated his Identity Card.
5. According to the Respondent, the Claimant was not a diligent employee and had several warning letters and when invited for a disciplinary hearing, he did not attend the hearing contesting the notice in writing and did not report to the work place thereafter and his employment was not terminated by the Respondent.



6. According to the Respondent, the Claimant was paid all his leave days and no leave travelling allowance was due as he did not travel, was not working overtime, was paid for public holidays and any rest days worked, salary was consolidated and he was a member of the National Social Security Fund.
7. The learned trial Magistrate found the Claimant less than truthful regarding the circumstances in which his employment was allegedly terminated and dismissed the claim in totality.
8. This is the judgement appealed against by the Claimant/Appellant who faults the trial court on various grounds namely;
 - a. The trial court failed to analyse the evidence on record and there was no evidence of invitation to the disciplinary hearing.
 - b. The trial court failed to consider the prayers for special damages even if the prayer for unlawful termination of employment had failed.
 - c. The trial court did not take into account the provisions of Section 44 and 45 of the Employment Act.
 - d. The trial court erred in law and fact by failing to take into account the minimum wage orders.
 - e. The trial court erred in law by failing to award leave pay, house allowance, public holiday pay, overtime, service gratuity and certificate of service.
9. Counsel urged the court to award the prayers sought in the Memorandum of Claim.

Appellant's submissions

10. Counsel addressed two issues namely; whether termination of the Claimant's employment was fair and procedural and entitlement to the reliefs sought.
11. On termination of employment, counsel relied on the sentiments of the court in various decisions including *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR and *James Ondima Kabesa V Trojan International Ltd* (2017) eKLR to urge the requirements of a fair termination of employment.
12. Counsel submitted that the Claimant's employment was terminated by word of mouth, he was not invited for a hearing and no charges were preferred as no complaint by a client was disclosed.
13. As regards the reliefs sought, counsel submitted that since the Respondent had failed to prove that the termination was fair, the Claimant was entitled to 12 months' salary as compensation and special damages as set out in the Memorandum of Claim.

Respondent's submissions

14. The Respondent's counsel isolated three issues for determination, namely; whether termination of the Appellant's employment was unlawfully, reliefs sought and costs of the appeal.
15. On the first issue, counsel submitted that although the Claimant testified that he was dismissed by word of mouth by the General Manager on 6th June, 2019, he on appeal appeared to be suggesting that he was given a month's notice as his counsel relied on the Claimant's letter dated 6th June, 2019, which the judge relied on too.



16. According to counsel, the Appellant's counsel was trying to give the Claimant's letter a different interpretation to mean that the Appellant was responding to a notice of termination of employment.
17. That the Appellant adduced no evidence of having been issued with a notice of termination of employment.
18. That there was no evidence of the Claimant being redeployed on 5th June, 2019 but on 4th June, 2019 when he received the invitation to attend the disciplinary hearing on 7th June, 2019.
19. According to counsel, the submission that the Claimant was given notice of termination was a new creation by counsel, a departure from the pleadings in the lower court.
20. That the invitation for the hearing on 7th June, 2019 additionally gave the Claimant redeployment orders.
21. Counsel submitted that the Claimant rejected both the invitation to the hearing and the redeployment vide his letter dated 6th June, 2019 and asked for his salary and never reported to work again.
22. That his letter was clear that he would not report to the work place again.
23. As regards the reliefs sought, counsel submitted that learned trial Magistrate considered the prayers for special damages which must be specifically pleaded and proved as held in *Ngunda V Ready Consultancy Ltd (2022) KECA 577*.
24. That the Appellant failed to establish a prima facie case for special damages.
25. On leave, counsel urged that the Claimant opted not to proceed on leave and was paid for the days Kshs.12,200/= for 20 days, paid lumpsum as Kshs.13,216/= inclusive of holiday pay and the Appellant's bank statement reflected a payment of Kshs.23,968/=.
26. As regards overtime, counsel submitted that Claimant only worked for 8 hours and had not furnished evidence of having worked overtime or how the amount claimed was arrived at as held in *James Kyama V Muthaiga Golf Club (2022) eKLR*.
27. On rest days, counsel submitted that the Claimant was entitled to one rest day per week as records of attendance show.
28. Counsel submitted that the Claimant was paid for public holidays worked and his salary was consolidated and no gratuity was payable as he was a member of the National Social Security Fund.

Determination

29. As established in legions of decisions, a first appeal is a re-trial and the court is bound to re-evaluate and analyse the evidence on record so as to arrive at its own conclusions bearing in mind that it neither saw nor heard the witness to assess their credibility as held in *Selle & another V Associated Motor Boat Co. Ltd & others (1968) EA 123*.
30. The Appellant faults the learned trial Magistrate variously.
31. As regards failure to analyse the evidence on record, the Appellant's counsel did not specifically set out what parts of the Claimant's evidence were neither considered nor analysed.
32. The learned trial Magistrate considered the Claimant's evidence on pages 3 and 4 of the judgement and concluded on page 4 that "in my view, he has not been candid."



33. Having seen and heard the witness before the court, the trial Magistrate must have had a justification for that finding.
34. For instance, the Claimant insisted that he had only one warning letter even after more copies were produced by the Respondent and he did not deny his signature on the documents.
35. The court is unpersuaded that the learned trial Magistrate failed to analyse the evidence before her.
36. Closely related to the foregoing ground of appeal is the contention that the trial Magistrate failed to consider that there was no evidence that the Claimant was invited for a disciplinary hearing and thus arrived at an erroneous decision that the termination was lawful.
37. In his written statement, the Claimant testified that on request, he reported to the head office on 6th June, 2019 and met one Mr. Machira, the General Manager who told him as he had breached protocol, he was no longer an employee and his identity card was detained.
38. From the evidence, it is unclear as to when the General Manager took possession of the Claimant's identity card and why he could not demand for its return on the same or other day or even report to the Labour Office or the police if the Claimant is to be believed his alleged termination of employment was verbal by the General Manager on 6th June, 2019.
39. However, in an unexplained turn of events, the Claimant wrote a letter to the Respondent on the same day stating inter alia;

“I am here writing this letter to inform you that I will not work with a notice since I don't understand my mistakes of dismissing from work. So I request you to give me my end month salary so that to use it attending the funeral of my late father who died on Saturday night.”
40. In his submissions, counsel for the Claimant alleged that after the verbal termination, the Claimant declined to serve under notice and opted to leave immediately.
41. An endorsement on the letter by the Respondent states;

“The guard disobeyed instructions to be redeployed. He removed his uniform and went away.”
42. What was the Claimant responding to in his letter dated 6th June, 2019?
43. Was it the alleged verbal termination of employment by the General Manager, which had no terms or conditions as the Claimant adduced no evidence of the same or was he responding to another notice?
44. The learned trial Magistrate was of the view that although the Claimant denied having received the invitation to the disciplinary hearing dated 4th June, 2019, he was aware of the complaints against him and the intended hearing as discernible from his letter.
45. The Claimant counsel's submission that the Claimant was to serve under a notice was not supported by any evidence by the Claimant or documentary.
46. From the Claimant's letter, it is decipherable that contrary to his allegation that the alleged termination was verbal and attempts to explain were unsuccessful, it is evident that some discussion took place and the Claimant was, as the trial court found aware of the charges against him.



47. The retort that “I will not work with notice . . .” is unclear but is a clear manifestation of the Claimant’s refusal to accept the Respondent’s proposals made on 6th June, 2019. But the letter goes further and informs the Respondent to pay the salary due to the Claimant.
48. Was the learned trial Magistrate bound to enquire as to what transpired thereafter with the Claimant having indicated that he would not work with notice? The answer to this question is in the negative.
49. In the court’s view, the Claimant’s letter dated 6th June, 2019 contradicts his evidence that he was verbally dismissed from employment before the letter was written.
50. Why would he be asserting that he will not work under notice as he had already been dismissed from employment?
51. Puzzlingly, the letter makes no reference to the Identity Card allegedly detained by the General Manager and why would a General Manager retain the Identity Card of an employee whose employment he has terminated by word of mouth.
52. The Claimant’s evidence on what transpired on 6th June, 2019 lacked coherency and credibility as the trial Magistrate found.
53. According to the Respondent’s witness, the Claimant absconded duty after his letter dated 6th June, 2019 and the Claimant’s conduct thereafter would appear to confirm the same as he filed a complaint with the Sub-County Labour Officer on 17th June, 2019.
54. It is clear that the Appellant/Claimant did not return to his place of work or the Respondent’s office after 6th June, 2019.
55. Section 47(5) of the *Employment Act*, 2007 provides that;

For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
56. In the instant suit, it was incumbent upon the Appellant/Claimant to prove not only that the Respondent terminated his employment but also that it did so unlawfully or unfairly.
57. The Claimant’s letter dated 6th June, 2019 is unambiguous that the Claimant refused to work under a proposal made by the Respondent’s General Manager and demanded his salary and did not engage the Respondent again on the issue.
58. For the foregoing reasons, the court is in agreement with the finding of the learned trial Magistrate that the Claimant failed to prove on a balance of probabilities that termination of employment by the Respondent allegedly on 6th June, 2019 was unlawful.
59. Although the Appellant’s counsel faulted the trial court for not taking into consideration the provisions of Section 44 and 45 of the *Employment Act*, 2007, counsel did not explain the context in which they were applicable bearing in mind that the trial court found the evidence on record insufficient to establish unlawful termination of employment.
60. Having found that the Claimant had failed to discharge the burden of proof under Section 47(5) of the *Employment Act*, 2007, neither the provisions of Section 44 nor 45 of the Act was applicable.
61. Having failed to establish that termination of his employment by the Respondent was unfair, the Claimant is not entitled to any of the reliefs provided under Section 49 of the *Employment Act*, 2007.



62. Similarly, counsel for the Appellant faulted the learned trial Magistrate on the ground that she did not consider the Minimum Wage Orders.
63. Counsel did not explain the particular order which the trial Magistrate ignored or the context.
64. Regulation of Wages Orders address minimum wage and the Claimant neither alleged nor pleaded underpayment.
65. His statement dated 22nd July, 2017 (altered by hand to read 2018) makes no reference to any underpayment or any claim grounded on the Regulation of Wages (General) Orders.
66. As regards the prayer for special damages as catalogued in the Statement of Claim, it is trite law that special damages must not only be pleaded but evidentiary proved.
67. In *Hahn V Singh* (1985) KLR 716 at 717, the Court of Appeal stated as follows;

“Special damages must not only be specifically claimed (pleaded) but also strictly proved . . . for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
68. Kimaru J. echoed similar sentiments in *Swalleh C. Kariuki V Haron Victor Nyongesa* (2021) eKLR as follows;

“In regard to special damages, the law is quite clear on the head of damages called special damages. Special damages must be both pleaded and proved before they can be awarded by the court . . .”
69. The court is guided by these sentiments.
70. As regards leave and leave allowance, documents provided by the Respondent revealed that the Claimant did not proceed on leave but was paid for the leave days and having not proceeded on leave, a leave travelling allowance could not be paid.
71. Ground (ix) of the Memorandum of Appeal dated 11th June, 2020 is unclear as it appears to relate to compensation.
72. It requires no belabouring that the provisions of Section 49 and 50 of the *Employment Act*, 2007 are only triggered by a finding that there has been an unfair termination of employment or summary dismissal and not otherwise.
73. The learned trial Magistrate made no such finding and awarded no compensation either.
74. On public holidays, the Claimant tendered no evidence of the particular public holidays when he worked and was not paid. His written statement makes no reference to having worked on a public holiday and was not paid and the same applies to overtime and off-days.
75. The Appellant is inviting the court to find that he worked during public holidays and overtime and was not paid, without providing any shred of evidence in support of the allegations as his written statement is reticent on the issues.
76. In the case of off-days, documentary evidence on record reveal that the Claimant had off-days.
77. The absence of relevant and essential particulars renders the claim for off-days unsustainable.



78. As regards service gratuity, the learned trial Magistrate found and this court had no controverting evidence that the Respondent was deducting NSSF contributions.
79. A statement from the National Social Security Fund (NSSF) would have effortlessly established that the Claimant was not a member of the scheme.
80. Significantly, the claim for service gratuity is not synonymous with service pay.
81. Whereas service pay is statutorily provided for under Section 35(5) of the *Employment Act*, 2007 and is only triggered where the provisions of Section 35(6) of the Act are inapplicable, service gratuity is contractual and the Appellant did not demonstrate that his contract of employment had a provision for service gratuity.
82. The prayer is unsustainable.
83. Finally, the claim for house allowance is not sustainable either as neither the written statement dated 22nd July, 2018 or 2019 make reference to any outstanding house allowance.
84. In its judgment, the trial court stated as follows;
- “He has also not proved entailment to one month’s salary in lieu of notice, leave days, travelling allowance, overtime, unpaid public holidays and rest days and house allowance going by the evidence adduced before court.”
85. This court has examined each prayer specifically in its endeavour to ascertain whether, the Claimant tendered evidence particular to any of them and found no persuasive evidence sufficient to hold otherwise.
86. As regards certificate of service, the Claimant is entitled to the same by dint of Section 51 of the *Employment Act*, 2007.
87. Accordingly, the appeal herein is for dismissal and it is dismissed save for the prayer for certificate of service which the Respondent shall issue within 30 days.
88. Since the award of costs is discretionary, the court is persuaded that it is only fair that parties bear their own costs.
- Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH DAY OF NOVEMBER 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty



of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

