



**Nyandika v Inter Security Services (Appeal E048 of 2021)
[2023] KEELRC 2950 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2950 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E048 OF 2021
AK NZEI, J
NOVEMBER 16, 2023**

BETWEEN

EUCABETH KERUBO NYANDIKA APPELLANT

AND

INTER SECURITY SERVICES RESPONDENT

*(Being an Appeal on the whole Judgment of Hon. F. N. Kyambia – CM
at Mombasa delivered on 23rd July 2021 in CM ELRC 933 of 2019)*

JUDGMENT

1. The Appellant was the Claimant in Mombasa CM ELR Case No. 933 of 2019 whereby she had sued the Respondent herein vide a memorandum of claim dated 29/10/2019 and filed in Court on 30/10/2019. The Appellant sought the following orders:-
 - a. a declaration that termination of the Appellant’s employment was unfair, unjust and wrongful.
 - b. compensation for unfair termination of employment (15,141.95 X 12)ksh. 181,703.40
 - c. one month salary in lieu of notice.....ksh. 15,141.95
 - d. severance pay (726.55X 15 days) X10 years ..ksh. 108,982.50
 - e. unremitted deductions (ksh. 400X11 months)....ksh. 4,400
 - f. underpaymentksh. 706,804.04
 - g. house allowance (1.006x12 months) x10 years +ksh. 4,024
 - h. unpaid leave days earned.....ksh. 117,587.4



- i. unpaid holidaysksh. 173,769.
 - j. costs of the suit and interest.
2. The Appellant had pleaded that she had been employed by the Respondent in 2007 and was earning ksh. 9000 per month at the time of termination on 30/8/2018. That the termination was without justifiable cause, and was effected unfairly without following due process laid down in law, and without paying the Appellant's dues.
3. Documents filed by the Appellant together with the memorandum of claim included the Appellant's NSSF statement covering the period 2008 upto August 2018, employment identification card, a demand letter, response to the demand and the Appellant's bank statements.
4. The Respondent defended the suit vide a memorandum of response dated 30/1/2020 and filed in Court on 3/2/2020. The Respondent denied the Appellant's claim and pleaded that the Appellant had been employed by the Respondent as a day security guard and was deployed at various duty stations, the last one having been National Museums of Kenya Mombasa, whose contract with the Respondent expired on 31/7/2018. That the Respondent issued the Claimant with a termination notice on 29/6/2018.
5. The Respondent further pleaded that it separated with the Appellant lawfully and paid her dues; including her salary for July 2018. The Respondent further pleaded that the Appellant's salary included an element for accommodation, that the Appellant was paid in lieu of leave and public holidays.
6. The Respondent further pleaded that it separated with the Appellant on 31/7/2018, and she instituted suit in the trial Court on 30/10/2019; and that accordingly; the Appellant's claim for continuing injury (namely underpayment, house allowance, unpaid leave days, unpaid holidays and payments of deductions) are statutorily time barred.
7. Documents filed by the Respondent together with the Memorandum of Response included a notice of termination dated 29/6/2018, termination letter dated 29/6/2018 and response letter dated 26/8/2018.
8. At the trial, the Appellant testified that she worked for the Respondent for 10 years, working from 6.00am to 6.00pm, working on holidays, without leave and without overtime payment. That after work on 31/8/2018, she received a call from her boss who told her not to go to work. That she nevertheless went to work on 1/9/2018 and found another person. That she was not given either a termination notice or letter and that she has not received the letters shown to be dated 29/6/2018. The Appellant adopted her filed witness statement as her testimony.
9. Cross-examined, the Appellant testified that she was not given a contract during the 10 years she worked, that she had not seen the letters dated 29/6/2018 and 26/8/2018 respectively; and that she was not privy to any contract between the Respondent and National Museums of Kenya.
10. The Respondent on the other hand called one witness (RW-1) who adopted his filed witness statement as his testimony and produced in evidence documents filed by the Respondents. RW-1 further testified that the Appellant worked with the Respondent as a day security guard from 2008 to 2018, was issued with a termination notice, and that her salary, which she had agreed to, included house allowance. The Respondent denied the Appellant's assertion that she never took leave and testified that the Appellant was duly compensated for holidays worked, and that NSSF and NHIF dues were duly submitted. That the Appellant was fairly terminated.



11. Cross-examined, the Respondent (RW-1) admitted that the Respondent had not produced in Court the Appellant's contract, and had also not produced any leave application forms and had not produced payslips to show that the Appellant had been paid for holidays worked. RW-1 further admitted that the letters produced by the Respondent in evidence had nothing to show that they had been received by the Appellant.
12. The trial Court delivered its judgment on 23/7/2021 and returned a finding that the Appellant had been fairly terminated upon being given a termination notice and notice of impending termination following the expiry of a contract between the Respondent and National Museums of Kenya. The trial Court further made a finding that the Appellant had failed to prove her claim against the Respondent, and dismissed the same in its entirety with costs to the Respondent.
13. Aggrieved by the said judgment, the Appellant preferred the present appeal and set forth the following grounds of appeal:-
 - a. the Learned Magistrate erred in law and in fact in dismissing the Appellant's appeal.
 - b. the Learned Magistrate erred in law and in fact in not considering the oral evidence by the Appellant and the Respondent adduced in Court regarding the claim in question.
 - c. the Learned Magistrate erred in law and in fact in failing to consider evidence and submissions presented by the Appellant in considering the claim in question.
 - d. the Learned Magistrate's judgment was against the weight of the need to dispense justice with fairness, and thus bad in law.
14. The Appellant is seeking the following reliefs:-
 - a. that the appeal be allowed with costs.
 - b. that the trial Court's judgment in CM ELR Cause no. 933 of 2019 delivered on 23/7/2021 by Hon. F.N. Kyambia (MR) Chief Magistrate be set aside.
 - c. that an award be entered in favour of the Appellant.
 - d. that costs of the appeal be awarded to the Appellant.
15. This is a first appeal. The entire case as presented before the trial Court is open to fresh consideration. A first Appellate Court is empowered to subject the whole of the evidence adduced in the trial Court to fresh and exhaustive scrutiny and to make conclusions about it; bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & Antoehr -vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
16. Upon considering the pleadings filed and evidence presented in the trial Court, issues that present for determination, in my view, are:-
 - a. whether termination of the Appellant's employment was unfair.
 - b. whether the Appellant is entitled to the reliefs sought in the trial Court.
17. On the first issue, it was a common ground that the Appellant was employed by the Respondent as a day security guard in 2008, and worked for ten years (until 2018) and that she was earning ksh. 9,000 per month at the time of termination of her employment. The Appellant testified that she was not given a contract, that she worked until 31/8/2018 and that while at home, she was called by her boss and told not to go to work. That she nevertheless went to work on 1/9/2018 but found another person.



- That she was not served with a termination notice or a termination letter; and had not been notified of any impending termination. That she had not seen the letters dated 29/6/2018 and 26/8/2018 which the Respondent produced in Court.
18. The Respondent, on the other part, admitted that there was nothing on record to show that the letters (notices) dated 29/6/2018 on termination of the Appellant's employment and termination of the Respondent's contract with National Museums of Kenya had been served on the Appellant. The Respondent did not, therefore, rebut the Appellant's evidence that she was not informed of any impending termination of employment, and was not issued with a termination notice.
 19. Failure by an employer to issue a termination notice under Section 35(1) (c) of the [Employment Act](#) renders termination of an employee's employment unlawful, and therefore unfair. On this account, I find and hold that termination of the Appellant's employment was unfair, and I so declare.
 20. The trial Court fell into error by holding that the Appellant had been given a termination notice when the alleged termination notice was not shown to have been received by and/or served on the Appellant, and when even the Respondent's witness admitted in evidence that the Respondent had nothing to show that the alleged notice had been received by the Appellant.
 21. On the second issue, and having made a finding that termination of the Appellant's employment was unfair, and taking into consideration the circumstances in which the Appellant's employment was terminated, I award the Appellant the equivalent of ten months' salary in compensation for unfair termination of employment; that is ksh. 9000x10 = ksh. 90,000.
 22. The claim for one month salary in lieu of notice is allowed at ksh. 9,000 as the Appellant never demonstrated that she was entitled to salary at a higher rate. She never pleaded with particulars the relevant minimum wage guidelines for any particular periods of time during the employment period. the Court cannot act on general allegations. Further, no evidence was adduced by the Appellant to demonstrate entitlement to a higher rate of salary.
 23. Further, and as correctly pleaded by the Respondent, the claims for salary underpayment, unpaid house allowance, unpaid leave and unpaid holidays are in the nature of continuing injury as contemplated in Section 90 of the [Employment Act](#). Action on such claims should be brought within twelve months upon cessation thereof. In the present case, the cessation date was the date of termination of the Appellant's employment, which was 31/8/2018 according to the Appellant's pleadings and evidence.
 24. The Appellant's suit in the trial Court was filed on 30/10/2019, over twelve months from the date of cessation/termination. Whether proved at trial or not, such claims were/are statute bared, and cannot be considered by this Court. I uphold the trial Court's dismissal of the same, though for different reasons.
 25. The claim for severance pay cannot be allowed as termination of the Appellant's employment did not result from redundancy.
 26. The claim for unremitted deductions was not proved, and cannot be granted. I have severally stated, and I repeat it here, that once statutory deductions are made from an employee's salary by an employer, such deductions cease to be the property of the employee. The deductions become the property and right of the statutory bodies on whose account the deductions are made. Such statutory bodies i.e NSSF and NHIF, have statutory mechanisms on how to pursue employers for remittance of any withheld deductions. An employee cannot lawfully seek to be refunded such deductions, unless it is demonstrated that the employer was not authorized in law to make such deductions.



27. The appeal herein partly succeeds. The trial Court's judgment delivered on 23/7/2021 is hereby set aside, and is substituted with a judgment for the Appellant against the Respondent as follows:-
- a. Compensation for unfair termination of employment.....ksh. 90,000
 - b. One month salary in lieu of noticeksh. 9,000
- Total ksh. 99,000
28. The Appellant is awarded costs of the appeal and costs of the proceedings in the Court below. Costs of the appeal shall be assessed on the lower scale.
29. The Appellant is also awarded interest at Court rates, to be calculated from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16th NOVEMBER 2023.

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

