



REPUBLIC OF KENYA



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**Hatari Security Gurads Ltd v Odongo (Appeal E012 of 2022)
[2023] KEELRC 2812 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2812 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E012 OF 2022
CN BAARI, J
NOVEMBER 9, 2023**

BETWEEN

HATARI SECURITY GURADS LTD APPELLANT

AND

COLLINS ODHIAMBO ODONGO RESPONDENT

(An appeal from the judgment and decree of Hon. K. Cheruiyot (SPM) in the Chief Magistrates Court in Kisumu delivered on 11th April, 2022, in Chief Magistrates Employment & Labour Relations Cause Number 168 of 2020)

JUDGMENT

1. This judgment relates to an appeal from a Judgment rendered on 11th April, 2022, where the Trial Court found in favour of the Respondent and awarded a sum of Kshs. 150,000/-, comprising of one-month salary in lieu of notice, damages for loss of employment and leave earned.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 10th May, 2022.
3. The appeal is premised on the grounds That:
 - i. The Learned Magistrate erred in law and in fact by holding that the Appellant unfairly terminated the Respondent from employment



- ii. The Learned Magistrate erred in law and in fact by holding that the Respondent did not desert

his duty and that the desertion was not supported by evidence notwithstanding that the Appellant demonstrated that the Respondent returned his work uniform to the Appellant on 16.08.2020, and failed to obey a lawful command to return to work consequent whereof he was issued with a warning letter dated 16.08.2020.

- iii. The Appellant notified the labour officer of the Respondent's desertion of duty a month after the Respondent returned his work uniform to the Appellant and failing to report to work during that period.
- iv. The Learned Magistrate erred in law and in fact by awarding the maximum compensation for unfair termination being the equivalent of 12 months' pay without laying any legal basis for the same.
- v. The Learned Magistrate erred in law and in fact by awarding Kshs. 20,000.00 to the Respondent as leave earned without laying any legal basis for the same.
- vi. The Learned Magistrate erred in law and in fact by awarding a month's pay in lieu of notice of termination of employment without laying any legal basis for the same and also notwithstanding that the Respondent deserted duty without the consent of the Appellant.
- vii. The Learned Magistrate erred in law and in fact by making a finding that where desertion is alleged, an employer must demonstrate efforts made to reach out to the employee with a view to seeking an explanation for the desertion.
- viii. The Learned Magistrate erred in law in awarding costs to the Respondent devoid of any demand letter issued to the Appellant.
4. The Appellant prays that the appeal herein, be allowed with costs and the judgment in favour of the Respondent set aside.
5. The appeal was prosecuted through written submissions. Submissions were filed for both parties.



The Appellant's Submissions

6. It is the Appellant's submission that the Respondent in his witness statement confirmed that he left his employment, and that when pressed during cross-examination, he disowned his statement and indicated to the Trial court that the signature appended thereon was not his.
7. The Appellant further submits that its witness produced in evidence a warning letter dated 16th August, 2020, issued to the Respondent on the same day for his failure to obey a lawful instruction from his employer
8. It is the Appellant's further submission that during cross-examination, the Respondent confirmed that he did not report to work on 16th August, 2020, as his uniform had been taken away, but which assertion was not in his pleadings. The Appellant had reliance in the cases of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR and Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others [2014] eKLR to support this position.
9. The Appellant submits that the Respondent herein, returned his uniform to the Appellant and failed to report to his assignment as directed by his employer.
10. The Appellant further submits that the Trial Magistrate had a duty to give reasons for awarding maximum compensation for unfair termination being the equivalent of 12 months' pay without laying any legal basis for the same. It had reliance in the case of Leonard Gethoi Kamweti v National Bank of Kenya Limited [2020] eKLR where the Court of Appeal observed thus:

“The last ground is raised by the Bank in their appeal against the award of 12 months' salary and in particular the fact that the Judge did not give reasons for the award as stated by this Court in the case of;-United States International University vs. Eric Rading Outa (supra) "In the instant appeal the learned trial Judge gave a maximum award of 12 months 'salary without assigning any reason for doing so at all. We have noticed a trend by the Employment and Labour Relations Court where maximum awards are made without assigning any reasons for doing so and without carrying out any evaluation of the effect such awards have on employers and on the economy in general. Awards such as the one made by the trial Judge in the judgment appealed from are made without any consideration of principles on assessment of damages and without assigning any reasons why a particular award is made"

The Respondent's Submissions

11. It is submitted that the Respondent tendered sufficient evidence that demonstrated his claim against the Appellant as spelt out in the Memorandum of Claim. It is the Respondent's further submission that adequate materials were placed before the Trial Magistrate that properly persuaded him to make a finding that the termination was both substantively and procedurally wrong.
12. The Respondent submits that the Appellant did not dismiss the Respondent for a lawful cause, and that it did not pay him his terminal dues. It is the Respondent's further submission that the Appellant no doubt breached the fundamental provision of the *Employment Act*, on payment of terminal benefits.
13. It is the Respondent's submissions that based on the provisions of the *Employment Act*, and the evidence placed before the Trial Magistrate, the termination of the Respondent was outrightly unfair and wrongful and that he was therefore entitled to the remedies sought in the Memorandum of Claim.



14. It is further submitted that the Respondent established his claim against the Appellant as pleaded, and is therefore entitled to the remedies sought.
15. The Respondent pray that the appeal herein, has no merit and should accordingly be dismissed with costs.

Analysis and Determination

16. I have considered the Appellant's Record of Appeal, and the rival submissions. The grounds of appeal are summarized as follows: -
 - i. The Learned Magistrate erred in law and in fact by holding that the Respondent did not desert duty and that the desertion was not supported by evidence
 - ii. The Learned Magistrate erred in law and in fact by awarding the maximum compensation for unfair termination being the equivalent of 12 months' pay without laying any legal basis for the same.
 - iii. The Learned Magistrate erred in law and in fact by awarding Kshs. 20,000.00 to the Respondent as leave earned without laying any legal basis for the same.
17. It is generally settled that an appellate Court will not interfere with a discretionary decision of the Judge/Magistrate appealed from on the simple ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case
18. In *Selle v Associated Motor Boat Co.* [1968] EA 123 the Court had this to say on appeals-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

19. The Appellant's position, is that it demonstrated that the Respondent returned his work uniform on 16.08.2020, as indication that he had resigned, and that he failed to obey a lawful command



to return to work. The Appellant further states that it notified the labour officer of the Respondent's desertion of duty a month after he had returned his work uniform to the Appellant and failing to report to work during that period.

20. The Appellant's assertion is that it demonstrated that the Respondent absence from work, pointed to the fact that the Respondent simply did not want to work anymore.
21. The Respondent in his evidence in chief, recanted his witness statement where he had indicated that he had resigned from the service of the Appellant. He did file a second statement and testified for the second time, where he stated that he was dismissed from service.
22. The Appellant's evidence is that the Respondent was issued warning letters on account of various acts of misconduct, including violence and reporting to work late. The Appellant's witness told the Trial Court that he asked the Respondent to resign when he reported to work late, and for refusing to obey orders to transfer him to a different station.
23. The Appellant's witness's testimony is that the Respondent surrendered his uniform when he was asked to resign, and left without a word and never returned. The question is whether the Respondent was terminated or whether he deserted duty.
24. The Trial Court's finding is the Respondent did not desert duty but was terminated. Sections 41, 43, 45 and 47 of the *Employment Act*, 2007, are the guiding provisions for employers when considering to terminate an employee.
25. The Appellant did not attempt to comply with the law on termination. It simply asked the Respondent to resign, and when he left without a formal resignation, it considered him to have deserted duty.
26. It is now settled that it is not enough for an employer to say that an employee has deserted duty and do nothing about it. The law is that an employer alleging desertion against an employee, must show efforts made towards reaching out to the employee. (See *William Gituma v RAA Limited* [2020] eKLR and *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR).
27. The Appellant did not show that it made effort to reach out to the Respondent, if for nothing more, but to take him through a proper disciplinary procedure for the acts of misconduct alleged to have been committed by him, in the interest of a lawful separation.
28. On this account, I do uphold the finding of the Trial Court that the Respondent was unfairly terminated.
29. The Appellant further challenged the maximum award of compensation, leave and notice pay on the premise that the trial court did not provide basis for its finding.



30. The Court of Appeal in *Chai Trading Co. Ltd v Joseph Kimathi Ikiamba* [2018] eKLR held thus on award of damages: -

“Was the award of 12 months’ salary proportionate, fair, and legal in view of the fact that the respondent was also awarded 2 months’ salary in lieu of notice; the appellant substantially complied with the procedure save for failing to inform the respondent that he had a right to invite a fellow employee or an union official and generally that the appellant suffered great loss due to a lapse in security that was within the docket of the respondent? Unfortunately, the learned Judge did not give reasons why he gave the maximum award. Had the learned Judge taken the foregoing into consideration or given reasons why he gave a maximum award having acknowledged that the appellant had partially complied with the law, perhaps he would have come to the same conclusion as we have, that in the circumstances surrounding this matter, the respondent did not deserve a maximum award. For the aforesaid reasons, we find merit in this appeal. In our own evaluation of the matter, we find the award of 12 months was excessive and substitute thereto with damages equivalent to 3 months’ salary.”

31. The Respondent, both in his testimony before the Trial Court and in his submissions on the appeal, did not deny reporting to work late and refusing to take lawful orders from his supervisor.

32. It is also correctly submitted by the Appellant that the Trial Court did not attempt to justify or explain why the Respondent was entitled to the maximum award.

33. The Supreme Court in *Kenfreight (E.A.) Limited v Benson K.Nguti* [2016] eKLR held that the *Employment Act* provides for a number of remedies for unlawful or wrongful termination under Section 49, and it is up to the judge to exercise his or her discretion to determine whether to allow any or all of the remedies provided. Further 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.

34. The Trial Court did not give reasons for the maximum compensation awarded to the Respondent. Further, considering that the Respondent did not controvert the acts of misconduct that attributed to his termination, I find and hold that he did not prove a case for maximum compensation, and I deem an award of three months’ salary sufficient compensation for the unfair termination.

35. On the award of Kshs. 20000 on account of leave not taken, the Respondent was in the service of the Appellant for only one (1) year. He was therefore only entitled to leave pay for the one year served, which is an equivalent of one-month salary and not the two months’ salary awarded by the trial court.

36. The award of kshs. 20,000 is set aside and substituted therewith Kshs. 10,000/-

37. Finally, it is not disputed that the Respondent was not issued termination notice nor paid in lieu of notice. The award by the Trial Court on account of termination notice is therefore upheld.

38. In whole, the Appellant’s appeal partly succeeds, and is allowed as follows:

- i. That the award of one-month salary in lieu of notice is upheld at Kshs. 10,000/-
- ii. The award of 12 months’ salary as damages for loss of employment is set aside and substituted with three months’ salary at Kshs. 30,000/-
- iii. The award of Kshs. 20,000 for leave earned is set aside and substituted with Kshs. 10,000/-



- iv. The award of costs and interest is set aside, and the Respondent awarded half the costs of the suit before the lower court.
- v. Each party shall bear their own costs of the appeal.

39. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9TH DAY OF NOVEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Kurui present for the Appellant

N/A for the Respondent

Mr. Erwin Odhiambo - Court Assistant.

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