



**Mocam Security Services Ltd v Kimotho (Appeal E083 of 2022)
[2023] KEELRC 3382 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3382 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E083 OF 2022
B ONGAYA, J
DECEMBER 20, 2023**

BETWEEN

MOCAM SECURITY SERVICES LTD APPELLANT

AND

ABIGAEI MUTONO KIMOTHO RESPONDENT

*((Being an appeal against the Judgment and decree of the Hon. C. K. Cheptoo,
Principal Magistrate delivered and given on the 27.06.2022 in Nairobi,
Milimani Chief Magistrates Courts E & LR Case No. E653 of 2021))*

JUDGMENT

1. The appellant filed a memorandum of appeal dated 28.06.2022 through the firm of A. E. Kiprono & Associates Advocates. The appellant appeals against the trial court’s judgment delivered on 27.06.2022 (by Hon. C. K. Cheptoo, the learned Principal Magistrate) and upon the grounds that the magistrate erred in law and fact:
 - a) In holding that the respondent worked at Multi Media University contrary to uncontroverted evidence showing that she worked at Meridian Hospital in Kiserian within Kajiado County.
 - b) In holding that the respondent had been underpaid contrary to the evidence that showed that the respondent has been paid more than the applicable minimum wage.
 - c) In awarding the respondent Kshs.128,220.70 on account of underpayment based on the minimum wage applicable to Nairobi yet the respondent worked in Kiserian within Kajiado County.
2. The appellant prayed for the following orders:
 - a) The appeal be allowed with costs to the appellant.



- b) The judgment delivered by the learned trial magistrate on 27.06.2022 be set aside.
- c) The respondent's claim dated 12.04.2021 be dismissed with costs to the appellant.
3. The respondent filed in the trial Court a memorandum of claim dated 12.04.2021. She alleged as follows. She was employed by the appellant in the position of a security guard on 27th September 2015 and was stationed at Meridian Hospital in Kiserian until 31st May, 2020 when the appellant's contract with the hospital came to an end when she was later stationed at the Kenya School of Law.
4. The respondent accused the appellant of frustrating her efforts in settling at her new work place and as a result unfairly and unprocedurally terminated her employment through unfair labour practices contrary to the requirements under Sections 41 and 45 of the Employment Act, 2007. She alleged that she was never accorded full leave days during the pendency of her employment with the appellant save for the year 2019 when she received Kshs.8,480 as payment in lieu of leave days not taken. The respondent further claimed underpayment and relied on the provisions of the Regulation of Wages (General) (Amendment) Order, 2013 and the Regulation of Wages (General) (Amendment) Order, 2018 that provided for the minimum wage for guards as Kshs.9,780.95/- and Kshs.13,572.90/- respectively.
5. In her statement of claim, the respondent claimed and prayed for:
- a) Payment in lieu of termination notice.
- b) Unpaid salary for May 2020 and 4 days in September 2015.
- c) Pay for leave days not taken for the year 2015 to 2020.
- d) The difference of pay between the claimant's salary and the recommended wage as was particularized.
- e) Service pay as particularized.
- f) Damages for unfair labour practices equal to 12-months' salary.
- g) Certificate of service.
- h) Interest on (a), (b), (c), (d) and (e) from the date of judgment until payment in full.
- i) Costs and interest from the date of judgment until payment in full.
- j) Any other appropriate relief that the Court deems fit.
6. The respondent particularized the claims and prayers in the memorandum of claim.
7. In response to the memorandum of claim, the appellant filed a response to memorandum of claim dated 16.06.2021, in which it admits having engaged the respondent herein. However, the appellant denied unfairly and/or unprocedurally terminating the respondent's employment as alleged in the memorandum of claim. The appellant further states that upon termination of its contract with meridian hospital, the respondent was redeployed to the Kenya School of Law but failed to report to her new work station. Efforts by the appellant's management to reach the respondent were futile and reached the conclusion that she (the respondent) declined the offer of deployment to the Kenya School of Law.
8. On the issue of remuneration, the appellant pleaded that the respondent's remuneration was agreed at an all-inclusive sum of Kshs.9,800/- and that the same was paid on a monthly basis.



9. The appellant further denied any claim for leave days maintaining that the respondent either took her leave /off days whenever they fell due or was paid in lieu of leave days not taken. The appellant denied the respondent's entitlement to the terminal dues as tabulated in her Memorandum of Claim on the main ground that there was no termination as pleaded and instead the respondent absconded duties without any lawful cause.
10. The appellant urged the learned trial magistrate to find the claim without basis and to dismiss it with costs to the appellant.
11. In the judgment the trial Magistrate granted the following orders:
 - a) Unpaid salary for 4 days in September 2015.... Kshs.1882.40/-
 - b) The difference of pay between the claimant's salary and the recommended minimum wage..... Kshs.128,220.70/-
 - c) Certificate of Service
 - d) Interest on a) and b) above
 - e) Costs of the suit.
12. Being dissatisfied with the trial Magistrate's Judgment the appellant filed the appeal. The respondent despite being served with the appeal failed to put in a response or file submissions to the appeal. The Court has considered the submissions filed by the appellant in support of its appeal and makes the following findings.
13. To answer the 1st issue, the Court returns that the undisputed pleading and evidence was that the respondent was last deployed at Meridian Hospital in Kiserian, Kajiado County. The trial Court found that the claimant worked at Multimedia University in Nairobi County from October 2015 to March 2016 and thereafter worked at Multimedia University also located at Nairobi County. The trial Court then proceeded to award Kshs.128,220.70. The findings were obviously at variance with the respondent's testimony that she was at Multimedia University from September 2015 to March 2016 when she was transferred to Meridian Hospital in Kiserian. The claimant confirmed that her monthly pay was Kshs.9,800.00 per month. The [Regulation of Wages \(General\) \(Amendment\) Order, 2018](#) came into force on 01.05.2018 and as submitted for the appellant, the applicable monthly salary for all other areas like Kiserian in the instant case was Kshs.7,240.95 for a day watchman and Kshs.8,636.30 for a night watchman. Thus, from March 2016 when the respondent was deployed to Kiserian, she has not shown the alleged underpayment. Prior to March 2016, the respondent did not show how the claimed underpayment accrued. The appellant's case that the award for underpayment was inconsistent with the evidence and established facts of the case is upheld. On that account, all the grounds of appeal will succeed.
14. To answer the 2nd issue, the Court returns that the appellant appears not to have attacked the trial Court's award of Kshs.1.882.40 salary for 4 days in September 2015, certificate of service and costs of the suit and which are upheld.

In conclusion, judgment is hereby entered for the appellant against the respondent for orders:

- a) The appeal is allowed with costs for the appellant.
- b) The trial Court's judgment and decree are hereby varied to the extent that the awarded Kshs.128, 220.70 for purported underpayment is hereby set aside.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
WEDNESDAY 20TH DECEMBER, 2023.**

BYRAM ONGAYA

.....

PRINCIPAL JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

