



**Total Security Surveillance Limited v Malii (Appeal E008 of 2023)
[2023] KEELRC 3459 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3459 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E008 OF 2023
M MBARÚ, J
DECEMBER 19, 2023**

**BETWEEN
TOTAL SECURITY SURVEILLANCE LIMITED APPELLANT
AND
CAROLINE KANINI MALII RESPONDENT**

JUDGMENT

1. The background to this appeal is the claim filed by the respondent in Mombasa CMELRC No.435 of 201 on the basis that on 31st March 2020 she was employed by the appellant as a day guard at a wage of Kshs. 12,900 per month. She was deployed at KCB-Mvita working from 6am to 6pm for 7 days each week but on 8 May 2021 she received dispatch instructions from the controller one Mrs Damaris Mutukhu to go to KPC-Changamwe PS (1) for 9 days. The person assigned there had taken time off. The claim was that on 10 May 2021 the respondent reported at KPC and after the 9 days she went back to her former work site. The 9 days had ended on 20 May 2021 but at the office, nobody attended to her. The operations manager, Mr Wesley informed her to return the next day, 21 May 2021 and was informed that the appellant had decided to terminate her employment. She was directed to attend for clearance on 29 May 2021. She claimed there was unfair termination of employment without notice, any reason or payment of terminal dues. She claimed the following;
 - a. Notice pay Kshs. 13,572.90;
 - b. Unpaid leave days Kshs. 1,096.63;
 - c. Uniform payments deductions Kshs. 3,900;
 - d. House allowances of 31 months Kshs. 26,467.15;
 - e. Unpaid public holidays Kshs. 5,220;
 - f. Underpayments Kshs. 8,747.70;



- g. Overtime pay Kshs. 41,566.63;
 - h. Compensation for unfair termination of employment;
 - i. A declaration that employment terminated following a redundancy; and
 - j. Costs.
2. The appellant in response stated that the respondent was employed on 29 May 2020 to 28 May 2021 when her contract expired. At the time she was earning gross wage of Kshs. 15,609 per month inclusive of the house allowance. The wage paid was per the Wage Orders, there was a weekly day off, leave days were allocated and work was for 8 hours each day. Events leading to termination of employment were that the respondent applied for employment as a security guard and was under a written contract ending on 28 May 2021. On 17 April 2021 the appellant got notice from its client to change the respondent. On 22 April 2021 the respondent took her 16 annual leave days. When the contract expired on 28 May 2021 there was no other position and on 1st July 2021 she was paid her terminal dues through cheque for Ksh.2008 which included;
- a. Notice pay;
 - b. Leave balance;
 - c. Uniform refund.
3. The respondent was not working during public holidays or extra hours as alleged and the claims made are all without merit and should be dismissed with costs.
4. In the judgement of the trial court, there was a finding that there was unfair termination of employment with an award of 6 months' gross wages together with underpayments at Kshs. 8,747.70 and overtime at Kshs. 41,566.63 but declined the other claims for;
- Unpaid public holidays;
 - House allowance;
 - Uniform payment;
 - Unpaid leave; and
 - Notice pay.
19. Aggrieved by the judgment and findings by the trial court the appellant filed this appeal on 14 grounds. The summary is that the findings that there was unfair termination of employment was in error since the contract of employment expired upon its full term and no notice, reasons or compensation accrue. The judgment should be set aside with costs.
20. Both parties attended and agreed to address the appeal by way of written submissions.
21. The court has gone back and forth seeking to have the appellant file written submissions. The judgment was adjourned twice to allow the appellant file written submissions. What exists on the Court Transmission System (CTS) and online e-filing platform, are blank documents? The court was denied these record.
22. The respondent submitted that the respondent was employed on 31 March 2020 as a day guard earning Kshs. 12,900 per month and worked until 21 May 2021 when the contract lapsed without renewal. However, notice of end of employment issued on 21st May 2021. The remedies sought and allowed by the lower court should be confirmed.



23. The respondent submitted that the trial court properly established that there was unfair termination of employment and the award of compensation for 6 months is justified. Overtime award was based on facts that the respondent would be at work for 12 hours each day and hence properly allocated as held in *Joseph Okindo & another v Vapor Sports Ministries* [2014] eKLR. The underpayments awarded were premised on facts that the respondent as a day security guard had her wages regulated under the Wage Orders and the appellant failed to meet the minimum wage threshold and the appeal should be dismissed with costs.

Determination

24. This being a first appeal, the court is required to review the entire record and arrive at own conclusions but take into account that the trial court had the chance to hear the witnesses.
25. The appellant produced work records in response to the claim before the trial court. This included the term contract issued to the respondent covering 29 May 2020 and ending 28 May 2020.
26. A term contract has a start and an end date. This is a legitimate and lawful contract in terms of Section 10(3) (c) of the *Employment Act*, 2007 (the Act) that;
- (c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;
27. In the case of Civil Appeal No. 18 of 2018 *Transparency International Kenya v Teresa Carlo Omondi* [2023] eKLR the court held that a fixed term employment contract does not create a legitimate expectation of renewal and the non-renewal does not amount to unfair termination of employment warranting compensation. Employment lapsed at the end of the term contract as held in *Trocaire v Catherine Wambui Karuno* (2018) eKLR that upon the lapse of a fixed term contract an employer is under no obligation to justify termination of employment on other grounds beyond the lapse of the fixed term contract.
28. The notice to end the employment contract is infused into the fixed term. No reasons, notice or hearing is required to issue.
29. There is therefore no wrongful, unlawful or unfair termination of employment where a fixed term contract ends on its provisions.
30. The award of 6 months' compensation is without any legal foundation.
31. On the other claims made for underpayments and overtime, these ought to have been assessed on the merits.
32. A security guard regulated under the *Regulation of Wages (Protective Security Services) Orders* is allowed a total of 60 hours each week with a rest day which translates to 10 hours each day. The claim that work was from 6am to 6pm is not challenged.
33. The appellant filed work records for leave days taken. There is also a record of work sheet for each day the respondent was at work;
- Work in at 8am
- Work out at 6pm
- Off on all Sundays.



34. These records are nicely done and appear to be from the same hand with signatures from the respondent. Even though the signature in the Verifying Affidavit and the signatures in the work sheets are fundamentally different, these were not challenged and were produced before the trial court.
35. What then is evident is that the respondent worked for 10 hours each day and took a rest day each Sunday. There is no overtime due as awarded.
36. With regard to underpayments, the claim was that the wage paid was Kshs. 12,900 without a house allowance. What was due from 31 March 2020 to 31 April 2021 was Kshs. 13,572 and for 13 months a claim for Kshs. 8,747.70 was due.

The appellant filed the payment statement for April 2021;

Basic wage is Kshs. 13,573;

House allowance is Kshs. 2,036;

Total earning Kshs. 15,609

Less statutory deductions Kshs. 2,209;

Net pay Kshs. 13,400

37. The wages were paid through a bank account. The claim for underpayment is without merit.
38. On this basis, what is clear from the records filed by the appellant is that the respondent was well remunerated for her time save, the record with regard to allocation of the due Public Holidays well set out in the Memorandum of Claim are not gone into. It is not addressed how the respondent took such time or compensated.
39. There is an outline of each Public Holiday due and accounted for. The Claim for Kshs. 5,220 is with merit. This is owed to the respondent.
40. The appeal largely successful, the claim for public holidays awarded, each party to bear own costs.
41. Accordingly, judgment in Mombasa CMELRC No. 435 of 2021 is hereby set aside and the respondent awarded Kshs. 5,220 for Public Holidays worked and not compensated. For the lower court and this appeal, each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF DECEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

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