



Swahili & another v Riley Falcon Security Services Ltd (Cause 151 of 2018) [2022] KEELRC 1187 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1187 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 151 OF 2018
NJ ABUODHA, J
JULY 8, 2022**

BETWEEN

JOHN SWAHILI 1ST CLAIMANT

DENNIS OTIENO ONYANGO 2ND CLAIMANT

AND

RILEY FALCON SECURITY SERVICES LTD RESPONDENT

JUDGMENT

1. The claimant pleaded that at all material time he was employed by the respondent from January, 2011 and worked until April, 2017 when the respondent unlawfully terminated his service and refused to pay his dues. the claimant contended that the termination did not comply with section 41 of the *Employment Act* in that his union was not informed of the intention to terminate his service, he was not given notice or payment in lieu and that he was not given opportunity to be heard before termination. The claimant further alleged that during the period he worked for the respondent he was grossly underpaid and that he worked overtime and during public holidays without being paid or granted rest days.
2. The respondent entered appearance and filed a response on April 20, 2018 in which it stated among others that the claimant was its employee working as a guard however, he was hired on one-year renewable contract the last renewal being on March 4, 2016.
3. The respondent denied the claimant worked from January, 2011 to April, 2017. The respondent further denied dismissing the claimant contrary to section 41 of the *Employment Act* as alleged. According to the respondent, the claimant resigned on his own volition which the respondent accepted and asked the claimant to pay one month's salary in lieu of notice which amount the claimant refused to pay.
4. The respondent further denied the claimant was underpaid and worked overtime.



5. On November 17, 2021 when the matter came for hearing, only the claimant attended and the court being satisfied that the respondent's counsel was duly served, proceeded ex-parte.
6. The claimant in his oral evidence stated that he recorded a statement on October 23, 2017 which he adopted as his evidence in chief. According to the claimant, he filed the claim because he was stopped from working. He was told there was no more work at Safaricom. A new Security company had been contracted. Upon termination they were not paid their terminal dues.
7. It was further his evidence that he was employed in 2011 at a monthly salary of Ksh.4500 and that he used to report to work at 6.00am. At the time of termination his monthly salary was Ksh.9,000/= and that he was not paid house allowance.
8. The second claimant stated that he was called Denis Otieno Onyango and worked for the respondent as a guard. According to him, the respondent never paid their terminal dues when the contract at Safaricom ended. They were further not given notice of termination.
9. It was his evidence that he was employed on February 14, 2015 as a Security Guard and used to report to work at 6.00 pm and leave at 6.00 pm. His starting salary was Ksh.4500/= and at the time of termination he was earning Ksh.8,700/= per month and was not paid house allowance.
10. The 1st claimant Mr. John Swahili Igombi, through a letter dated April 3, 2017 resigned from the respondent. By a letter of the same date the respondent accepted the claimant's resignation but on condition that he pays respondent one month's salary in lieu of notice. From the foregoing, the claimant having voluntarily resigned, a claim for unfair termination is not available to him.
11. Concerning the second claimant he testified that he was never paid his terminal benefits when his contract was terminated. It was common ground by both claimants that their contracts were terminated when the contract between the respondent and Safaricom was terminated. What the court deduces from this is that the claimants' service was not terminated on disciplinary grounds but because the parent contract between the respondent and Safaricom ended when Safaricom contracted a new security company. The issue of unfair termination under section 45 of the Employment Act does not therefore arise. The nearest the separation comes to could be a redundancy under section 40 of the Employment Act however both claimants never pleaded or alluded to the issue of redundancy.
12. Both claimants on March 14, 2019 amended their claims before the court. In the amended claims the claimants sought among others a declaration that the termination carried by the respondent was unlawful, the respondent underpaid them, and payment of amounts claimed under paragraphs 8 unfortunately both amended statements of claim do not contain paragraph 8.
13. It is rule of Civil Procedure that once a party amends their pleading the amended pleading overwrites the one amended. A party cannot revert to the amended pleadings since the implications would be a situation where the court would be dealing with bits and pieces of a claim or defence split between the amended pleading and the previous one. This was a fatal flaw to both claims before the court.
14. Assuming it was possible to still rely on the original claim, paragraph 8 lists claims for one month's salary in lieu of notice, unpaid public holiday, overtime dues, severance pay unpaid house allowance and underpayment. The court however, noted that from the payslips filed by both the claimants and the respondent contained payments for house allowance and overtime where worked.
15. Concerning underpayment, the claimants never produced the relevant wage order to show what the gazetted minimum wage was and by how much less the respondent was paying them. In absence of this, there would be no basis for granting the claim.



16. From the foregoing observations the court finds and holds that there was fatal defect in the two claims when they were amended making it impossible to make any monetary award. To this extent both claims are dismissed but with no order as to costs.

17. It is so ordered

DATED AT ELDORET THIS 8TH JULY, 2022

DELIVERED AT ELDORET THIS 8TH JULY, 2022

ABUODHA JORUM NELSON

JUDGE

