



REPUBLIC OF KENYA



KENYA LAW
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**Imbaya v Brinks Security Services Limited (Appeal E102 of 2021)
[2022] KEELRC 14635 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 14635 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E102 OF 2021
NZIOKI WA MAKAU, J
NOVEMBER 17, 2022**

BETWEEN

ZEPHANIA BUYUKA IMBAYA APPELLANT

AND

BRINKS SECURITY SERVICES LIMITED RESPONDENT

*(Being an Appeal against the decision of the Chief Magistrates Court in Nairobi
Milimani CMEL Cause No. 1906 of 2019 - Zephania Buyuka Imbaya v Brinks Security
Services Limited (Hon. D.M Kivuti (SRM) (Presiding) delivered on 13th August 2021)*

JUDGMENT

1. A brief background to this appeal is that the claimant/appellant filed suit against the respondent *vide* a memorandum of claim dated October 16, 2019, seeking a declaration that termination of his employment was unlawful, malicious, unprocedural and an infringement on his constitutional rights. He further sought maximum compensation for wrongful dismissal and other terminal benefits. The respondent in response denied the particulars of the claim, averring that the employee deserted his duties, and prayed for dismissal of the claim with costs. Upon hearing testimony and evidence by witnesses from both parties, the hon Trial Magistrate found that the evidence by the respondent that the claimant deserted the workplace was consistent and believable and constituted a ground of summary dismissal. The learned Magistrate thus found the circumstances of the dismissal justified and the claim not sustainable and thus dismissed the claim with no orders as to costs.
2. Being dissatisfied with the judgment of hon DM Kivuti (SRM) delivered on August 13, 2021 in Nairobi Milimani CMEL cause No 1906 of 2019 - Zephania Buyuka Imbaya v Brinks Security Services Limited, the appellant filed a memorandum of appeal dated September 9, 2021 premised on the following grounds:



- i. The learned Magistrate erred in fact by failing to analyse the evidence on record and arrived at a wrong conclusion thereby dismissing the suit by the appellant herein;
 - ii. The learned Magistrate erred in both law and fact by failing to take into consideration minimum wage orders in arriving at judgment not to award special damages;
 - iii. The learned Magistrate erred in law by failing to award the appellant certificate of service in breach of section 51 of the [Employment Act](#);
 - iv. The learned Magistrate erred in law by failing to consider whether the respondent complied with the provisions of section 41 of the [Employment Act](#);
 - v. The learned Magistrate erred in law by failing to award the appellant underpayment notwithstanding express provisions of the [minimum wage order](#);
 - vi. The learned Magistrate erred in law by failing to give reasons as to why special damages were not awarded;
 - vii. The learned Magistrate erred in law by failing to award the appellant for the public holidays that he worked in complete disregard to sections 10 & 74 of the [Employment Act](#), cap 226 Laws of Kenya;
 - viii. The learned Magistrate erred in law by failing to award the appellant for the overtime that he had worked as claimed in complete disregard to sections 10, 18, 27 and 74 of the [Employment Act](#), cap 226 and the [Minimum Wages Order](#) 2017;
 - ix. The learned Magistrate erred in law by failing to consider the claimant's submissions more particularly with regard to special damages.
3. The appellant thus seeks that the said decision by hon Kivuti be set aside and in its place, judgment be entered in consonance with the prayers contained in the memorandum of claim dated October 16, 2019 in Milimani CMEL Cause No 1906 of 2019 - Zephania Buyuka Imbaya Brinks v Security Services Limited. The appellant also seeks that costs of the appeal be awarded to him. The matter was disposed by way of written submissions.

Appellant's Submissions

- 4 The appellant submits that evidence before the trial court at page 25 to 26 of the record of appeal indicates he mentioned in his witness statement that he informed the controller Mr Wanyonyi of the accident. The appellant submits that he also mentioned the numerous times he visited the office before he was declared a deserter and having been informed by the HR Officer that investigations were ongoing. It is the appellant's submission that there was never any rebuttal from the respondent on the foregoing statements. He further submits that the letters dated April 30, 2019 and May 22, 2019 demonstrate that termination of his employment was unfair. That the letter dated April 30, 2019 at page 52 of the record of appeal served as both the notice of desertion and the termination letter and established that there was no notice to show cause or hearing convened for the claimant/appellant to state his case before termination. That he authored the second letter dated May 22, 2019 wherein he was seeking his terminal benefits from the respondent after learning that his services with the company had been terminated but he did not receive any response to this letter. The appellant further submits that the letter dated July 28, 2019 at page 54 of the record of appeal also indicated that he had lodged an appeal to the termination on June 27, 2019 and was pleading for the respondent to act on the same. That the said appeal has never been acted upon and its wording and subsequent silence from the respondent clearly did not depict him as a deserter. He requests this court to note that the letter dated



July 28, 2019 formed part of the documents the respondent availed to the trial court and which also elicited no response from the respondent.

5. It is the submission of the appellant that his submissions before the trial court at pages 59 to 62 of the record of appeal were clear on why he considered the termination of his employment unfair; including filing an appeal against the decision to dismiss him and receiving no response on at least two occasions. That he relied on the authority of *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* [2016] eKLR where the court in summary placed a burden on the employer to show that reasonable steps had been undertaken to trace the employee and found that it is not enough to just state that an employee deserted. The appellant thus questions the proof relied upon by the trial court in determining that he indeed deserted when he maintained that he did not desert duty. Furthermore, the respondent did not demonstrate the efforts it had made in tracing him with its witness failing to prove that the letter was posted to him (page 81 of the record of appeal). He further submits that the trial court while justifying the termination, did not utter a single mention of the *Employment Act* and more specifically, sections 41, 43, 45 and 47 with regard to termination of employment.
6. The appellant submits that his dismissal was both procedurally flawed and without merit and even submitted on the same before the trial court while placing reliance on reliable authorities. He invites this hon court to rectify the reversible error made by the trial court and declare that he was unfairly terminated from employment by the respondent. In regard to the terminal benefits he sought in his claim, the appellant submits that the court did not have any reasons to deny the prayer for overtime, rest days, unpaid public holidays, underpayments, interest and costs to the cause and this court should thus award him as prayed. The appellant relies on the case of Peter *Otabong Ekisa v County Government of Busia* [2017] eKLR where the court held that if the employer was unable to rebut the evidence by the claimant, then the claimant employee had proved that there was no valid reason to dismiss him on a balance of probabilities. On the issue of work record, the appellant relies on sections 10 and 74 of the *Employment Act* and the case of *Abigael Jepkosgei Yator & Another v China Hanan International Co. Ltd* [2018] eKLR where the court affirmed that in legal proceedings, the law places the duty to produce work records upon the employer and that where work records are not produced, any claim made by an employee with regard to terms and conditions of employment must be taken as the truth. It is the appellant's submission that the respondent clearly had a greater burden other than putting him to strict proof but failed to discharge the burden.

Respondent's Submissions

7. The respondent reiterated its submission in the trial court, dated June 18, 2021. It submits that from sections 45 and 47 of the *Employment Act*, it is clear that the burden of proving that the termination was unfair vests on the employee while the burden on the employer is to justify the grounds for termination. That in the instant case, the claimant/appellant had a duty to prove that he did not desert duty but failed to tender any evidence showing that he did not desert duty. That he also notably did not mention the police station he allegedly reported the matter to or produce the occurrence book to support his allegations. That the claimant/appellant therefore failed to discharge his duty as per the provisions of section 45 of the *employment Act*. The respondent denies the appellant's allegations that the trial court never considered his evidence submitting that the judgment on pages 84-86 of the record of appeal demonstrates that the trial court, after analysing the evidence, framed two issues for determination and concluded that the claimant/appellant deserted work. Further, the respondent's evidence on pages 80 to 82 of the record of appeal clearly supports the decision of the trial court on desertion and that its letter dated April 30, 2019 at page 52 of the record of appeal informing the appellant of the decision to terminate his services after unsuccessfully contacting him, shows that the appellant deserted work on



April 10, 2019 after the accident. It is the respondent's submission that it proved its case on a balance of probability that the appellant was terminated on grounds of desertion.

8. It is the submission of the respondent that contrary to the appellant's assertions, it responded to his letter dated May 22, 2019 by informing him of his dues *vide* a letter dated July 15, 2019 at page 49 of the record of appeal. The respondent submits that the other alleged letter dated June 27, 2019 was never part of the appellant's documents and had not been produced to prove it exists. While the respondent agrees with the holding in the case of *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* (supra) relied upon by the appellant, it submits the case is distinguishable in that the instant case is one of desertion and not unfair termination. It further submits that the appellant having deserted employment, compliance with section 41 of the *Employment Act* was hence not applicable. Furthermore, it is submitted that the claimant/appellant did not prove his case on a balance of probability to warrant him being granted damages for unlawful termination.
9. The respondent submits that it is trite law that special damages must be specifically pleaded and proved and that the appellant had a duty to request or give notice to the respondent to produce any document that he thought would be necessary in his case, but he did not. The respondent submits that section 74 of the *Employment Act* does not require an employer to produce the documents in court and that section 74(2) provides for an authorised officer to access the said records for inspection while section 69 of the *Evidence Act* provides the procedure for seeking documents deemed useful to one's case. It submits that however, the appellant opted not to use the said provisions to obtain the documents useful to his case. The respondent further submits that the appellant did not prove his claim for overtime, rest days and public holidays hence the claims were not available for him. That for underpayments, they negotiated a salary which the appellant accepted and this court should look at the intention of the parties. The respondent submits that if this court however finds that the appellant has proved his claim, it should note that he only worked from July 16, 2018 to April 10, 2019 which translates to 8 months and 24 days and not 10 months as pleaded. In a nutshell, the respondent urges the court to dismiss the appeal with costs to the respondent.
10. This being a first appeal, the court is bound to apply the principles enunciated in the case of *Selle & Another v Associated Motor Boat Co. of Kenya & Others* [1968] EA 123 where the Court of Appeal for East Africa stated:

“ An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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, this 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. (*Abdul Hameed Saif vs Ali Mohamed Sholan* (1955), 22 EACA 270.”
11. Having so warned myself, it behoves me to consider the grounds of appeal and determine whether there was any infraction by the trial court to warrant a reversal of the learned Magistrate. The appellant must be alive to the fact that in employment cases it is upon the claimant to prove his case in terms of Sections 45 and 47 of the *Employment Act*. The respondent on its part had to prove that (a) the reason for the termination is valid; (b) that the reason for the termination is a fair reason— (i) related to the employees conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure.



12. The appellant was accused of desertion. Curiously, the letter dated April 30, 2019 informed the appellant of his alleged desertion. The same letter communicated the dismissal of the appellant. It appears at page 52 of the record of appeal. It is odd that this letter served as both the notice of desertion and termination. In my considered view, this letter established that there was no notice to show cause issued to the appellant, that there was concerted effort to bring the circumstances of his absence within the purview of desertion. Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration. As the respondent failed in this regard, the court would consider the claim of unfair termination to hold ground.
13. The appellant was entitled to the safeguards identified in the case of *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* (supra). In failing to make an effort to contact the appellant, the employer fell into error where the termination meted out was improper. In finding so, the court notes that the claimant in the court below made efforts to establish his status but the respondent failed to even consider his terminal dues. The appellant was paid a salary of Kshs 17,400/- a month plus overtime. The salary was above the minimum on the Wages General Orders he produced as the minimum therein was Kshs 14,420/-. He can therefore not state that he was underpaid as this is not factual. He was also paid overtime which means his extra work was factored in. The court did not see a single letter where he demanded payment for public holidays or any other alleged non-payment of dues other than his demand letter. He was bound to seek payment while in employment and if he acquiesced in non-payment of certain allowances (for which there is no proof) he cannot mount a claim with success upon termination of his employ.
14. In light of the foregoing finding on his alleged desertion, the appeal is partially successful and the appellant is entitled to Kshs 52,200/- being 3 month's salary as compensation for the unlawful dismissal, a certificate of service and costs in the appeal strictly on the quantum before this court. All the other claims and grounds of appeal fail and are dismissed with no order as to costs. In the final analysis, the appellant is entitled to:
- i. Kshs 52,200/- being 3 month's salary as compensation for the unlawful dismissal.
 - ii. Certificate of service in terms of section 51 of the *Employment Act*,
 - iii. Costs on the sum in (i) above.
 - iv. Interest on the sum in (i) above at court rates from the date of this judgment till payment in full.
- 15 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2022

NZIOKI WA MAKAU

JUDGE

