Case Number:	Civil Appeal 301 of 2015
Date Delivered:	03 Nov 2017
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Philip Nyamu Waki, Roselyn Naliaka Nambuye, Patrick Omwenga Kiage
Citation:	Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR
Advocates:	Mr. Henry Kabiru for the Appellant Ms Winnie Sang for the Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	ELRC Cause No. 1050 of 2012
Case Outcome:	Appeal dismissed, no order as to the costs
History County:	Nairobi
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 301 OF 2015

BETWEEN

PIUS MACHAFU ISINDU …………………...…...……………………. APPELLANT

AND

LAVINGTON SECURITY GUARDS LIMITED …........……….....……. RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (Nzioki wa Makau) dated 8th May, 2014

in

ELRC Cause No. 1050 of 2012

****

JUDGMENT OF THE COURT

1. For a period of about ten years between 2001 and 2011, the appellant herein worked for the respondent as a security guard. But on 24th October, 2011, he found himself without a job. He says the respondent verbally told him on that day that his employment was over but gave him no reasons. The employer says it never terminated the applicant's services orally or at all, as claimed. On the contrary, it was the appellant who deserted his employment without notice or formal resignation. The trial court **(Nzioki wa Makau)** heard both sides and found that the appellant had deserted his employment and was therefore not entitled to the claims he made. Was the appellant pushed or did he jump" That is the main issue.

2. In his statement of claim, the appellant pleaded 'unjustified, unfair, unlawful, wrongful and illegal' termination of employment. He claimed service pay for 3 years (2008 to 2011), notice pay for 1 month, accrued leave not taken for 216 days, overtime from 2001 to 2011, rest days, unpaid public holidays and house allowance. He also sought one year compensation for unlawful dismissal as well as unremitted NSSF contributions from July 2001 to December 2002. The total monetary claim was Sh. 761,674.

3. All those claims, including the date of employment and salary earned were denied by the respondent and the appellant was put to strict proof. It was averred that the appellant frequently reported late for

work as a result of which several customers complained. A refresher course was then recommended for the appellant, as was the company policy for employees who made mistakes, but instead of the appellant reporting for the course, he said he would rather resign and disappeared from his employment.

4. In support of the claim, the appellant testified orally and called a fellow employee as a witness. He said he was hired as a guard in July 2001 by a Director of the respondent called Chelimo (later changed to one Bosco, the Operations manager) and was initially paid Sh. 2,100 per month. Incrementally that salary went up to Sh. 8,300 but he was never given any pay slip or letter of appointment. Initially the salary used to be paid in cash but in 2008 accounts were opened with Equity Bank and the salaries were deposited there monthly. He testified that the employer never complained about his guarding services. But on 23rd October, 2011, the supervisor, one Kilonzi, told him to report to the office after work and he did so the following morning. When he reported, he was told to go home until he is called back. No reasons were given to him. He returned in November and the Area Manager whom he could not recall, told him to go home. He further testified on each of the items listed in his claim. His workmate supported his claim that the employer never complained about the appellant's guard services and that the salary was consolidated. He produced a pay slip provided by the employer to show that overtime, house allowance and travelling allowances were not paid.

5. In response, the respondent gave evidence through its Operations-in-Charge/ Supervisor, the Deployment Officer, and the Human Resource manager. The gist of their testimony was that the appellant was employed in February 2002 and not 2001; his salary was inclusive of all monthly dues; salary slips were issued and salaries paid through the bank; there was a complaint by a customer about late reporting to duty by the appellant; to correct such mistakes, the supervisor advised that the appellant be taken for a refresher course; the appellant refused to attend the refresher course and instead deserted duty; the respondent did not dismiss or terminate the appellant's employment but instead he absconded; and that as a result the appellant is not entitled to claim anything from the respondent.

6. Upon considering the evidence on record and the submissions of the parties, the learned trial Judge made the following findings:-

"The issue for determination is principally if the Claimant was unlawfully or unfairly dismissed from employment. The Claimant testified that he was employed in 2001 yet his letter of Equity *(sic)* ***stated he was employed in February 2002. His witness who was employed in February 2003 testified that the Claimant was junior. The Claimant testified that he was employed by Chelimo a director but in cross-exam testified that he was employed by Bosco the Operations Manager. He was adamant that he never received a payslip and was not paid house allowance. If indeed that was true how then did he determine that he was not paid house allowance" What led him to believe that his salary excluded house allowance" The Claimant testified that he was asked to go to the offices of the Respondent and when he reported he met Kibisu and Kilonzi. He says that he was told by an Area Manager he could not name to go home and wait to be called. He did not produce any letter to that effect and it would seem the Respondent's version of what transpired on their respective roles in the summons to the Claimant and their evidence was***

consistent. The Claimant sought overtime for the period he worked yet there was no record he availed of his alleged extra hours. No note demanding payment of overtime was produced either and it is ample *(sic)* ***clear that the Claimant made many allegations but failed to prove them. He displayed a statement from NSSF which proved that his employer placed him in the category of employees who are not entitled to service. He however was able to demonstrate that the Respondent was tardy in remittance of NSSF dues."***

7. An order was made for production of the NSSF records and issuance of certificate of service to the appellant but the claim was otherwise dismissed. Ten grounds of appeal are laid to challenge that finding. In summary, the learned Judge is said to have erred in law and fact in:-

a) failing to require the employer to produce employment records under Section 74 of the Employment Act ('the Act').

b) not awarding the appellant any of his dues after working for 10 years.

c) finding that wages paid to the appellant were consolidated and included house allowance.

d) exhibiting open bias against the appellant in finding that the appellant absconded from duty.

e) failing to make a finding on compliance with section 41 of the Act.

f) failing to hold that the respondent had not provided any reasons for the termination of employment in line with Part VI of the Act.

g) placing on the onus of proof on the appellant contrary to Section 47 of the Act.

h) delivering a judgment not supported by the evidence.

i) failing to make a finding on the process used in terminating the appellant's employment.

j) failing to make a determination on the lawfulness of otherwise of the termination of employment.

8. In urging those grounds, learned counsel for the appellant **Mr. Henry Kabiru** filed written submissions but made no oral highlights. The submissions focused on two broad issues, firstly, that the respondent did not comply with various provisions of the Act including ***section 3 (5)*** which requires the employer to cause the contract of employment to be in writing; ***section 20*** which requires issuance of an itemised pay slip; ***section 21*** on statutory deductions; ***section 18*** which requires the employer to submit reasons for dismissal of an employee to a labour officer; and ***section 74*** which requires an employer to keep records on sick leave, annual leave, rest days and such like.

9. Secondly, submitted counsel, the contract of employment was unfairly terminated as envisaged under ***sections 45*** and ***47*** of the Act since there was no proof of misconduct or reasons given for termination. As the procedure set out in ***section 41*** of the Act was not complied with, it followed that the remedies claimed by the appellant were payable as a matter of course. Counsel attacked the basis for accepting the evidence that the appellant deserted his employment because no action was taken against him and he had no previous disciplinary issues. Several cases were cited in support of those submissions including: ***Mary Chemweno Kiptui vs Kenya Pipeline Company Limited [2014] eKLR; Kenya Union of Commercial Food And Allied Workers vs Meru North Farmers Sacco Limited [2014] eKLR; Koki Muia vs Samsung Electronics East Africa Limited [2015] eKLR; Nyangenya Hezron Nyakeremba & 2 Others vs Xfor Security Solutions [2016] eKLR;*** and ***Kenya Ports Authority vs Silas Obengele [2008] eKLR.***

10. In response, learned counsel for the respondent, **Ms Winnie Sang,** also filed written submissions and made no highlights. She submitted that there was no dispute that the appellant was the respondent's employee and there was no need, therefore, to produce his employment records to prove that fact. The various sections of the Act cited to show the duties of employers were thus not relevant. According to counsel, the crux of the claim was unfair termination or wrongful dismissal and there was a direct response, proved in evidence, that the appellant deserted his employment after refusing to attend a refresher course. Citing ***section 47*** of the Act, counsel submitted that the onus of proving unfair termination lay on the appellant but it was never discharged. In her view, what was on record was scanty and contradictory evidence from the appellant which was properly rejected by the trial court. Furthermore, urged counsel, ***section 47 (1)*** required the employee to lodge a complaint with the Labour officer within three months but none was lodged. In all the circumstances, she concluded, the trial court properly assessed the evidence on record and reached the right conclusion.

11. We have considered the appeal record and the submissions of counsel by way of a retrial in order to reach our own conclusions in the matter in line with ***Rule 29 (1) (a)*** of the Rules of this Court. As we do so, we must recall that:

"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding; and an appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

--See ***Mwangi vs Wambugu [1984] KLR*** **page 453**.

12. As stated at the opening paragraph of this judgment, the main issue to determine is whether the appellant's employment was unfairly terminated or he simply deserted it as found by the trial court. As correctly submitted by the respondent's counsel, the fact of employment and compliance with the duties

of an employer with regard to documents of employment are not disputed matters and therefore needed no proof. In any event, the issue was neither raised in pleadings nor made part of the prayers in the claim. Needless to say, parties are bound by their pleadings. In our view, the first broad ground of appeal relating to the documents required to be kept by an employer is unnecessary to consider and we give it a wide berth. Was there termination of employment, even before considering whether there was fairness in termination"

13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal ***(section 43)*****;** prove the reasons are valid and fair **(*section 45*);** prove that the grounds are justified ***(section 47 (5)***, amongst other provisions. A mandatory and elaborate process is then set up under ***section 41*** requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and the Civil Procedure Act/Rules. Finally the remedies for breach set out under ***section 49*** are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:

"...to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees..."

Those provisions are a mirror image of their constitutional underpinning in ***Article 41*** which governs rights and fairness in labour relations.

14. ***Section 47 (5)*** of the **Act** provides for the procedure to be followed in matters of complaints of unfair termination as follows:

"(5) <u>For any complaint of unfair termination of employment or</u> <u>wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee</u>, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer." [Emphasis added]

So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under ***section 43 (1)*****:** "***to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."***

15. We have carefully examined the testimony of the appellant in relation to the discharge of his evidential burden but we are afraid it does not lay the necessary foundation to require the employer's response under ***section 43***. The preoccupation of the appellant was to show that he was an employee and that he was entitled to certain payments during his employment over a period of 10 years which he should be paid on termination of his employment. Although he was confused about the officers who employed and deployed him, he did not deny the authority of the Operations officer in charge at the time who later became a supervisor, **Edwin Kibisu Aluwira,** who testified that the appellant was working under him, and **Paul Kilonzi Kithome**, the Deployment officer who was in charge of training of recruits and refresher courses and deployment of staff thereafter. Kilonzi confirmed that the appellant was

indeed referred for a refresher course and that he talked to him, but the appellant said he would rather resign than go for the course. He left, only to be seen in court many months later. The evidence of those officers was not seriously challenged and it remained a matter of credibility of the witnesses. The trial court chose to believe the respondent's witnesses and on that it was the better judge as it saw and heard them.

16. One may indeed wonder what the appellant did after the alleged termination of his employment. He certainly did not make any immediate protest in writing or at all, either to the respondent, the labour officer or even his workmate, **John Elayesa Likhalami** who testified on his behalf. John testified that he only heard from undisclosed sources that the appellant had been dismissed. It was only in March 2012, more than five months later that the appellant's lawyer addressed a demand letter to the respondents. Three more months later in June 2012, he filed the claim in the Industrial Court. This is hardly the conduct of an employee whose services were summarily and rudely terminated. On a balance of probability, he was not pushed. He jumped.

17. On that finding, it only remains for us to dismiss this appeal for lack of merit and affirm the decision of the Employment and Labour Relations Court. We make no order as to the costs of the appeal.

Dated and delivered at Nairobi this 3rd day of November, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

………………………....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

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