

KENYA / JUDGMENT

Brink Security Services Limited v Katenge [2025] KEELRC 2156 (KLR)

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COURT

Employment and Labour Relations Court

BEFORE

AK Nzei

CASE / FILE NUMBER

Appeal E186 of 2022

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Brink Security Services Limited v Katenge (Appeal E186 of 2022) [2025] KEELRC 2156 (KLR) (18 July 2025) (Judgment)

Neutral citation:

[2025] KEELRC 2156 (KLR)

Republic of Kenya

In the Employment and Labour Relations Court at Nairobi

Appeal E186 of 2022

AK Nzei, J

July 18, 2025

Between

Brink Security Services Limited

Appellant

and

Nzou Katenge

Respondent

(Being an appeal of the whole Judgment of Honourable Selina N. Muchungi delivered on the 30th September, 2022 at Milimani MC. ELRC Cause No. 1114 of 2019, at the Senior Resident Magistrate's Court)

Judgment

1. The Appellant herein was the Respondent/Defendant in Milimani Commercial Court CM ELR Case 1114 of 2019 whereby it had been sued by the Respondent herein vide a Memorandum of Claim dated 4th June, 2019. The Respondent (Nzou Katenge), had sought the following reliefs:-a.A declaration that the Respondent's dismissal of the Claimant was illegal, unfair and totally unjustified.b.A declaration that the Claimant was entitled to payment of a total of Kshs.2,171,767/= made up of:-a.12 months' salary in compensation for unfair termination of employment (12,221 x 12) Kshs.146,652/=b.Salary for the 6 days worked in April 2017 Kshs.2,444/=c.One month salary in lieu of notice at the statutory minimum wage (Regulation of Wages Order 2015)Kshs.12,221/=d.Underpayment on account of Regulation of Wages Order 2015 Kshs.28,083/=e.Unpaid 4 hours overtime worked from Monday to Saturday at the statutory minimum wage Kshs.1,652,400/=f.Unpaid house allowance for the entire duration of service Kshs.329,967/=.
2. The Claimant, who is the Respondent in the appeal herein, had pleaded in the trial Court:-
 - a.that he was employed by the Respondent as a Security Dog Handler on 16th February, 2002, and was earning a monthly salary of Kshs.11,000/= as at April 2017; which was a gross underpayment.b.that the Respondent worked from 6. 00 p.m to 6. 00 a.m.c.that on the night of 31st August/1st September, 2013, whilst the Respondent was in the course of his duties as a night dog handler, the Appellant's Manager, Mr. Wambua, together with others, visited the Respondent's site at Kileleshwa and strangely decided to scale the fence and access the premises; and that unknown to the Respondent that it was company officials, he released the dog and it attacked Mr. Wambua and bit him. That Mr. Wambua got annoyed and started beating the Respondent, accusing him of sleeping while at work.d.that the Respondent went to hospital and was treated; and that upon the matter being reported to the police and being discussed by the Appellant company, it was resolved that the Respondent had not done anything wrong, and should continue working.e.that on 6th April, 2017, the Respondent was summoned by the Appellant's Investigating Officer, a Mr. Ngayo Judah, who had been employed in 2016, and asked about the 2013 event that had been resolved; to which the Respondent responded that the issue was of 2013 and had already been resolved.f.that the said Mr. Ngayo told the Respondent to hand over the company uniform and not to report the following day as his services had been terminated.g.that the Appellant's action amounted to gross summary dismissal which was unlawful and unfair as the Respondent was not given a hearing before dismissal, no valid reasons for the dismissal were given to the Respondent, and that the Respondent had done no wrong to warrant his dismissal.

3. Documents filed alongside the Memorandum of Claim included the Respondent's written witness statement dated 4th June, 2019 and an evenly dated list of documents, listing some 6 documents. The listed documents were copies of a clearance form, Police Report, a P3 form dated 9th September, 2013, a warning letter dated 24th September, 2013, a demand letter dated 13th April, 2018 and Regulation of Wages Order 2015.
4. The suit was defended by the Appellant vide a Memorandum of Response dated 4th November, 2019, denying the Respondent's claim and pleading:-a.that the Respondent's salary was consolidated, and included house allowance; and that the terms of the Respondent's employment were guided by his contract of employment.b.that prior to 17th April, 2017, the Respondent had been involved in disciplinary cases and had received warning letters. That on 4th April, 2017, the Respondent reported to his place of work drunk, upon which the Appellant summoned him for a hearing.c.that the Respondent was fully paid his terminal dues at the time of leaving employment.d.that the Appellant however admitted that the Respondent was entitled to:-i.April Salary Kshs.4,200/
=ii.Uniform deduction Kshs.2,400/=iii.Accrued leave 1. 75 x 350 x 7
Kshs.4,287. 50/=Total = Kshs.10,848. 50/=
5. Documents filed alongside the Memorandum of Response included a list of witnesses dated 4th November, 2016 and an evenly dated list of documents, listing 9 documents. The listed documents included a job application letter, guarding letter of employment, uniform issuance form, warning letters, demand letter, letter dated 10th May, 2019, leave form, certificate of service and a letter by the Respondent.
6. At the trial, which is shown to have opened on 17th May, 2022, the Respondent, being the Claimant in the primary suit, adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 3 of this Judgment. The Respondent denied having gone to work drunk on 4th April, 2017, and testified that no examination was conducted on him to prove that he was drunk. That regarding the 2013 issue whereby he had been accused of sleeping while on duty, he had been given a warning letter. That he was not subjected to any disciplinary proceedings, and was not paid any dues. That he initially earned Kshs.8,000/= which was in 2016 increased to Kshs.11,000/=. That he worked from 6. 00 p.m to 6. 00 a.m.
7. Cross-examined, the Respondent testified that he worked for 4 extra hours as he worked for 12 hours each day. That it had been agreed that he would work for 12 hours. That he worked for 15 years, and used to have 4 off days in a month. That he used to go on leave, save for 2 years. That he was claiming overtime for the 15 years worked. That he was not being paid house allowance and was being underpaid. That he had severally received warning letters over the years of service.

8. The Respondent further testified that on 4th April, 2017, he went to work at 6 pm as usual. That when he knocked at the gate, the gate was opened by a G4S guard. That the Company (Appellant) picked him up, and he was told to go home. He denied having gone to work while drunk. That the Appellant took his uniform, and he was not called back. That the Appellant raised the issue of the 2013 incident and warning letter(s) issued thereon.
9. The Respondent called one witness, Raymond Nzioka (DW-1), who adopted his filed witness statement dated 6th June, 2019 as his testimony and produced in evidence the documents referred to in paragraph 5 of this Judgment. DW-1 further testified that the Respondent was to work from 6. 00 p.m to 6. 00 a.m, and never worked outside the agreed working hours, and went on leave during his employment. That the Respondent's claim for overtime included the days when he was on leave and off days. That regarding the claim for underpayment, the Respondent asked for underpayment for 23 months without specifying the months. That the Respondent reported on duty while drunk on 4th April, 2017, and could not work under such circumstances. That the Respondent never went back to collect his dues.
10. Cross-examined, DW-1 testified that the Respondent had been issued with a contract but the same was not before Court, that the Respondent's salary was consolidated and inclusive of house allowance, although the Respondent had no document/payslip to prove that fact; and that the Respondent had been issued with warning letters, the last one having been issued to him on 24th September, 2013. That the Respondent was dismissed for appearing at work while drunk and failing to execute his duties. That the Respondent was not issued with a show cause letter, but that on the day of his termination (10th April, 2017), he was allowed to meet his seniors and to give his explanation. That the witness (DW-1) had no document to show that the Respondent was subjected to a disciplinary hearing.
11. The trial court delivered its Judgment on 30th September, 2022 and made a finding that the Appellant had failed to prove that the reasons for the Claimant's termination were valid; and that due process was not followed in terminating the Respondent's employment as he was terminated by the Respondent's Investigating Officer on being questioned about a 2013 incident, and was not accorded a chance to defend himself. That the Respondent was not served with a show cause letter on any charges brought against him. The trial Court held and declared that the Respondent's dismissal was unlawful, unfair and unjustified.
12. On the reliefs sought, the trial Court awarded the Respondent Kshs.28,085. 30 being underpayment for 23 months (from 1st May, 2015 to April 2017). The trial Court also awarded the Respondent Kshs.854,556/= being overtime worked during the Respondent's 15 years of service, and upon taking into account leave and off days during the period of employment.
13. Further, the trial Court awarded the Respondent Kshs.322,637/= being house allowance; and 12 months' salary (12,221. 10 x 12) = Kshs.146,653/=) being compensation for the unfair termination of employment. The Respondent was also awarded costs of the suit and interest.

14. Aggrieved by the trial Court's Judgment, the Appellant preferred an appeal to this Court vide a Memorandum of Appeal dated 27th October, 2022, which was subsequently amended by leave of the Court, and set forth the following grounds of appeal:-a.The learned Magistrate erred in both law and fact by holding that the Respondent failed to prove allegations of misconduct by the Respondent.b.The learned Magistrate erred both in law and fact by finding that the Respondent had proved his claim as pleaded when there was no evidence to support this finding.c.The learned Magistrate erred in law and fact by awarding the Respondent alleged 23 months' underpayment, overtime and house allowance, yet the claims were time-barred being of the nature of continuing damage/injuries, thus the Court had no jurisdiction to award the claims.d.The learned Magistrate erred in law and in fact by awarding the Respondent the alleged 23 months' underpayments, overtime and house allowance, yet the Respondent did not provide specific proof in support of the said claims, the claims therein being specific in nature.e.The learned Magistrate erred in law and fact by failing to consider the Appellant's evidence at the trial.f.The learned Magistrate erred in holding that the Respondent had proved his case on a balance of probabilities when there was no evidence to support this findingg.The learned Magistrate erred in fact and in law by awarding the Respondent one month salary notice pay and 12 months' salary compensation in damages, yet the Respondent was summarily dismissed on just and proper grounds, and further without consideration of the duration of service of the Respondent at the Appellant's employment.h.The learned Magistrate erred in fact and in law by awarding the Respondent costs and interest following a finding in favour of the Respondent on claim unsupported by law, facts and evidence.
15. The Appellant sought the following reliefs on appeal:-a.That the appeal be allowed with costs, and the Respondent's suit in the lower court be dismissed with costs.b.That costs of the appeal be awarded to the Appellant.
16. I will handle and determine the foregoing grounds of appeal together.
17. This is a first appeal. The duty of a first appellate Court has long been settled, and has been re-stated in numerous decided cases; one of which is Easy Coach Bus Services & Another – vs – Henry Charles Tsuma & Another (Suing as the Administrators and Personal Representatives of Josephine Wayenga Tsuma), where the Court stated as follows:-“7. Firstly, as a first appellate Court, this Court has a duty to examine matters of both law and fact and to subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis, bearing in mind that the appellate Court did not have an opportunity to hear the witnesses first hand and to test the veracity of their evidence and demeanor.”
18. It is for the foregoing reason that I have, in this Judgment, preceded to fully summarise the pleadings filed and the evidence presented thereon before the trial Court; and which I have considered. Having done that, issues that fall for determination, in my view, are as follows:-a.Whether termination of the Respondent's employment by the Respondent was unfair.b.Whether reliefs sought by the Respondent in the trial Court were merited.

19. On the first issue, Section 45(1) and (2) of the Employment Act provides as follows:-1. No employer shall terminate the employment of an employee unfairly.2. A termination of employment by an employer is unfair if the employer fails to prove –a.that the reason for the termination is valid.b.that the reason for the termination is a fair reason –i.related to the employee’s conduct, capacity or compatibility; orii.based on the operational requirements of the employer; andc.that the employment was terminated in accordance with fair procedure.”
20. According to the evidence presented in the present case, the allegation/accusation levelled against the Respondent by the Appellant, and on the basis of which the Respondent’s employment was terminated, was that the Respondent reported on duty while drunk on 4th April, 2017. No evidence, however, was presented before the trial Court demonstrating that the Respondent had been subjected to any form of scientific and/or medical examination and his drunkenness proved and/or established. The validity of the reason given by the Appellant for terminating the Respondent’s employment not having been proved, I do agree with the trial Magistrate that the termination was unfair; and proceed to uphold his finding in that regard.
21. Further, the Appellant’s attempt to also base termination of the Respondent’s employment in April 2017 on incidents that were said to have occurred in 2013 and beyond, and regarding which warning letters had been issued to the Respondent, was unlawful and unfair, and amounted to an unfair labour practice. Warning letters, in their nature, are a conclusive disciplinary action against an employee regarding specified wrongs committed at specified times. The employer, in exercise of his managerial discretion, decides to formally warn an employee and to allow him and/or her to continue working.
22. Going back to the warning letters years later and purporting to dismiss and/or again discipline the employee based on the issues that formed the basis of the warning letters is an unfair labour practice. The situation may, however, be different where an employee is formally warned and allowed to continue working on condition that he or she does not repeat the impugned act or omission; or does not commit a related act or omission within a specified period of time. This was not shown to have been the case in the present matter.
23. Still on the first issue, the Appellant was not shown to have adhered to the mandatory procedure set out in Section 41 of the Employment Act in terminating the Respondent’s employment. The Respondent had been accused of reporting on duty while drunk. Being intoxicated during working hours amounts to gross misconduct by dint of Section 44(4)(b) of the Employment Act. Section 41 of the Act provides that where an employer considers terminating an employee’s employment on account of misconduct, poor performance or physical incapacity, the procedure set out in that Section must be adhered to, and the employee must be given an opportunity to be heard on the accusations levelled against him and to call a witness as specified in the Section. The Appellant’s witness (DW-1) testified before the trial Court that he had nothing to show that hearing was held before termination. To that extend, termination of the Respondent’s employment was procedurally unfair.

24. It was stated as follows in the case of Walter Ogal Anuro – vs – Teachers Service Commission [2013] eKLR:-“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
25. In view of all the foregoing, it is my finding that termination of the Respondent's employment was substantively and procedurally unfair.
26. On the second issue, I uphold the award by the trial Court of Kshs.2,444/= being salary for the days worked by the Respondent in April 2017. It was not demonstrated that the Respondent had been paid for those days.
27. I also uphold the award of Kshs.12,221. 10 being one month salary in lieu of notice pursuant to Section 35(1)(c) of the Employment Act. The minimum wage payable to a night watchman in Nairobi (under Regulation of Wages Order, 2015) was demonstrated by the Respondent (by documentary evidence) to have been Kshs.12,221. 10/=, exclusive of housing allowance.
28. I also uphold the award by the trial Court of Kshs.28,085. 30 being underpayment from 1st May, 2015 to April 2017, in view of the said 2015 Minimum Wage Order. The Appellant never denied that the Respondent was earning Kshs.11,000/=per month at the time of termination of his employment in April 2017, and never demonstrated that he (the Respondent) was earning a different amount of salary at that time.
29. The award of Kshs.854,556/= being overtime payment during the 15 years' period of employment is hereby set aside. Whereas the Respondent testified that he was [initially] earning Kshs.8,000/= per month and that this amount was subsequently raised to Kshs.11,000/=, which he earned until he was terminated, he did not adduce any evidence on the minimum wages that he ought to have earned per month during all the years of employment preceding 1st May, 2015. He did not produce in the trial Court the Minimum Wage Orders published between the date of his employment and 1st May, 2015 when the 2015 Minimum Wage Order was published. The trial Court is shown to have based its calculation of the awarded overtime payment for the entire period of employment on the 2015 Minimum Wage Order. Minimum Wage Orders are published from time to time, and provide for both monthly, daily and hourly wage rates, pursuant to provisions of the statute (the Labour Institutions Act 2007). It is trite that the law does not apply in retrospect. In this regard, the trial Magistrate fell into deep error; hence the setting aside of her award of Kshs.854,556/= by this Court.
30. For record purposes, unpaid overtime payment is in the nature of special damages, and must always be specifically pleaded and strictly proved.
31. The award of Kshs.322,637/= as unpaid house allowance is hereby set aside for the same reasons as the award of overtime payment. The award was calculated based on the 2015 Minimum Wage Order and yet it covered the entire period of employment.

32. The award of Kshs.146,653/= being the equivalent of 12 months' salary as compensation for unfair termination of employment is hereby upheld. I have taken into account the period of time that the Respondent worked for the Appellant and the manner in which the Respondent's employment was terminated.
33. The award of costs and interest is upheld in the manner stated hereinafter.
34. In sum, and having considered written submissions filed on behalf of both parties, the appeal herein partly succeeds. The trial Court's Judgment delivered on 30th September, 2022 and the decree issuing therefrom are hereby set aside to the extent stated in this Judgement; and for avoidance of doubt, Judgment is hereby entered for the Respondent against the Appellant as follows:-a.Days worked in April 2017 Kshs.2,444/=b.One month salary in lieu of notice Kshs.12,221. 10/=c.Underpayment Kshs.28,085. 30/=d.12 months' salary in compensation for unfair termination of employment Kshs.146,653/=
35. The awarded sum shall be subject to statutory deductions, as applied to the Respondent at the time of termination, pursuant to Section 49(2) of the Employment Act.
36. The awarded sum shall attract interest at Court rates from the date of the trial Court's Judgement.
37. The Respondent is awarded costs of the suit in the Court below, and the same shall attract interest at Court rates from the date of the said Court's Judgement.
38. Each party shall bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY 2025 AGNES KITIKU NZEI JUDGE
Order This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees. AGNES KITIKU NZEI JUDGE
Appearance: Miss Okumu for the Appellant Miss Amemba for the Respondent

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Prepared on 13 October 2026 · Esheria