**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**
**CIVIL APPEAL NO 171 OF 1999**

**FRANCIS MAINA NDEGWA ……..……..……APPELLANT**

**VERSUS**

**SECURITY GUARDS SERVICES LTD…...……...RESPONDENT**

**JUDGMENT**

This is an appeal from the Judgment of Hon. Mrs. R. V. Wendoh in Milimani RMCC 6711 of 1995 delivered on 22nd April, 1999.

The Appellant, an employee of the Respondent, had sued his employer for recovery of Kshs.325,875/= being terminal and other benefits payable to him upon his dismissal from employment. After hearing several witnesses and submissions, the trial court concluded that the Appellant's claims for overtime, and "service pay" had not been proved, and disallowed those claims. The lower court, however, allowed two smaller claims, one for pay in lieu of notice, and the other for leave, totalling Kshs.14,233/=.

Aggrieved by that decision, the Appellant has appealed to this Court, outlining the following five grounds of appeal:

> ***1. The Learned Principal Magistrate erred in law and in fact in dism issing the Plaintiff's claim for overtime worked between 1989 to 1994.***
>
> ***2. The Learned Principal Magistrate erred in law and fact in holding that the Plaintiff has delayed in bringing the suit for overtime yet the claim was not statutorily barred by the Limita tion of Actions Act or any other statute.***
>
> ***3. The Learned Principal Magistrate erred in law and in fact in dismissing the Plaintiff's claim for service benefits for the period 1988 to 1994 despite holding that his dismissal was wrongful and unlawful.***
>
> ***4. The Learn ed Principal Magistrate erred in law and misdirected herself by not considering the very clear Provisions of the Regulation of Wages and Conditions of Employment Act Cap 229 of Wages (Protective Security Services).***
>
> ***5. The Learned Principal Magistrate's judgme nt was against the weight of evidence.***

The only issue in this appeal is whether the Appellant is entitled to his claims for overtime pay, and "service pay".

With regard to the claim for overtime, Ms. A. Wahome, Counsel for the Appellant argued that according to the Appellant's testimony he had worked overtime for 6 hours per day for 6 days every week from 1988 to 1992 and was entitled to a claim of Kshs.273,400/= for that period. She submitted that the trial court was wrong in its conclusion that the claim for overtime was time-barred, under the Limitations of Actions Act.

I agree with Counsel for the Respondent, Ms. Njuguna, that the issue is not whether the claim was time-barred, but whether the Appellant was genuinely entitled to this claim. She submitted that the Appellant had not produced any agreement to show that he was entitled to overtime; that only security guards were paid overtime separately; that all other employees, including the Appellant were given a consolidated pay that included all benefits and payments, including overtime, if any.

I agree with the Respondent's Counsel. The onus was on the Appellant in the lower court to prove his case for overtime. His only evidence was that he had worked those many hours over that period of time. On the other hand, the Respondents had three witnesses who said otherwise. The trial court chose not be believe him, and the Court delivered itself, in part, as follows:

> **"The Plaintiff claims overtime which had allegedly – cumulated for years. If indeed he was entitled to it there should have been indication of that earlier and not for him to wait till he has been dismissed to ask for overtime. It seems there had been no agreement to pay overtime or if there was then it was consolidated as alleged otherwise, it should have been claimed earlier and the delay persuades court to believe that the Plaintiff knew he was not entitled to it. The claim for overtime therefore fails."**

Based on the evidence before the Court the Magistrate was completely correct in coming to that conclusion when presented with two different versions. Indeed, this Court would ask the same question: why would a person who genuinely believes he has a claim for overtime actually wait for some six years to claim it? It is inconceivable that he would wait that long for such a large sum of money. This Court is satisfied, as was the lower court, that there was no agreement to pay overtime, and overtime pay, if any, was consolidated with the rest of his benefits as per the pay slip exhibited in the lower court.

I, therefore, find that the Appellant's case for overtime must fail.

With regard to "service pay", Counsel for the Appellant argued that the Appellant was either entitled to severance pay under Section 16 A of the Employment Cap. Cap 226, or by virtue of Regulation 17 (1) of the Regulations of Wages (Protective Security Services) Order (Legal Notice No 24 of 1998).

The evidence before the Court showed, and the Magistrate found, as a question of fact, that the Appellant had not been declared "redundant" and was, therefore, not entitled to severance pay, which is payable, under Section 16 A of the Employment Act to employees who have been declared redundant. The trial court also found that there was no contract between the parties to entitle the Appellant to severance pay. I am satisfied that based on the evidence before her, she came to the correct conclusion.

However, the learned Magistrate seriously erred in law when she did not consider whether the Appellant (Plaintiff) was entitled to gratuity pursuant to Regulation 17 (1) of the Regulations of Wages (Protective Security Services) Order (supra), which was brought to her attention in the submissions made by Counsel (see page 60 of the record). The Magistrate was under a duty to consider the claim, and the submissions made, and make a Ruling on the same. I have looked at the Plaint. Paragraph 6 makes a specific claim for "service benefits" of 15 days for each year worked.

Although the claim should have properly been called "gratuity", I believe it was loosely described as "service pay" presumably from the first few words of Regulation 17 (1).

The aforesaid regulation states as follows:

> "***17 (1) After five years' service with an employer, the employee shall be entitled to eigh teen days***

***pay for every completed year of service by way of gratuity based on the employee's wage at the time of termination of service.***

***(2) An employee who is summarily dismissed for lawful cause or who terminates his services for any reason other than ce rtified ill -health or retirement age shall not be entitled to a gratuity."***

The above Regulation was cited to the trial court, and a detailed submission made. The Magistrate having found that the Appellant's employment was wrongfully or unlawfully terminated, was duty bound to find that Regulation 17 applied to him. I so find, and award the sum of Kshs.17,475/= being gratuity payable to the Appellant. I will note at this point that under the above regulation, an employee is entitled to 18 days pay for every year worked. The Appellant here has claimed for only 15 days. I cannot award him more than what was claimed.

Accordingly, I enter Judgment for the Appellant for Kshs.17,475/= in addition to other sums awarded to him by the lower court, with interest at court rates as pleaded in his plaint. As the Appellant has had 50% success in this appeal, I award him one-half of the costs of this appeal.

Dated and delivered at Nairobi this 8th day of December, 2004.

**ALNASHIR VISRAM**

**JUDGE**