Andambi v Baran Company Limited (Civil Appeal E051 of 2025)
[2026] KEELRC 183 (KLR) (28 January 2026) (Judgment)

Neutral citation: [2026] KEELRC 183 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL E051 OF 2025

DKN MARETE, J

JANUARY 28, 2026

BETWEEN

VICTOR IDALIA ANDAMBI ..... APPELLANT

AND

BARAN COMPANY LIMITED ..... RESPONDENT

JUDGMENT

1. This matter originated by way of Amended Memorandum of Appeal dated 25th February, 2025. It comes out as follows;

    1. The trial Court erred in law and fact as it ignored and/or disregarded the Pleadings and evidence on record as read with the mandatory provisions of the *Employment Act* when it held that Claimant had failed to prove that he was entitled to overtime, service pay and house allowance.

    2. The trial Court erred in law and fact in shifting the burden of proof from the Respondent to the Claimant while considering the claims of overtime, Service Pay and House Allowance, when statutorily, reasonably and practically it is the responsibility of the Respondent to keep records in respect of the same yet the Respondent had failed to do so, or even to show that it had complied with the requirements of the law.

    3. The judgment in the aspects above is not supported by the law, pleadings, evidence and Submissions on record.

2. The Appellant prayed for orders That:

    1. The Appeal be allowed and the judgment and decree of the Lower Court be set aside and varied in part so as to allow and include the claims of overtime, service pay and house allowance as prayed in the Memorandum of Claim.

2. The costs of the Appeal herein and in the Court below be awarded to the Appellant.

3. The Appellant submitted that as an employee, he was entitled to certain statutory benefits and protections, and that the Respondent, as the employer, had a mandatory duty to maintain proper employment records. The Appellant contended that the Respondent withheld crucial records regarding his employment, including leave, overtime, and house allowance, from the trial Court. As a result, the trial Court erred in law by shifting the burden of proof to the Appellant, thereby occasioning an injustice.

4. The Appellant further submitted that the Respondent did not controvert his claim that he worked on public holidays and Sundays throughout his period of employment. By operation of law, this claim should therefore be deemed admitted. He also submitted that he was not registered as a member of NSSF or any other pension scheme. It was the statutory duty of the Respondent to ensure that all employees were registered with at least NSSF and NHIF. Once he claimed service pay, the burden to prove non-entitlement shifted to the Respondent, which the Respondent failed to discharge. He contends that the trial Court erred in placing the burden of proof on him to excuse the Respondent from paying service or severance pay, a misdirection which caused grave injustice. He emphasized that the law requires an employer to keep proper employment records, which should have been availed to the Court to demonstrate compliance with statutory obligations, including payment of house allowance.

5. In response, the Respondent submitted that overtime constitutes special damages that must be strictly proven. The trial Court, therefore, correctly declined the claim for work on public holidays and Sundays, as it had not been proven. The Respondent further submitted that during the period of the Appellant's employment, the salary for a security guard, under LN. 2 of 2019, Regulation of Wages (General) (Amendment) Order 2018, ranged between Kshs.13,572.90 and Kshs.15,141.95 inclusive of house allowance, and that the Appellant was paid a consolidated salary. The Respondent argued that the Appellant was well-remunerated and had not provided evidence to support his claim for house allowance, noting that he never complained about the salary being inadequate. Regarding service pay, the Respondent contends that the Appellant failed to prove non-membership to any pension scheme or that deductions were made and not remitted to NSSF.

6. Having considered the record, the judgment of the trial Court, and the rival submissions, this Court turns to the Appellant's claim for overtime. The claim arose from his assertion that he worked on Sundays and public holidays throughout his employment without compensation. While the trial Court declined the claim on the basis that overtime constitutes special damages which must be strictly proven, a principle correct in law, this court finds that the trial court failed to consider the statutory framework governing employment records.

7. Section 74(1)(f) of the *Employment Act* imposes a mandatory duty on employers to keep written records of hours worked by employees, including overtime. This obligation is not discretionary, as employers control attendance and work schedules. Further, section 10(7) of the *Employment Act*, 2007 provides that where an employer fails to produce written particulars or records required by law, the burden of proving or disproving an alleged term of employment rests on the employer.

8. The Court is guided by Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers (KUDHEIHA) v Mombasa Sports Club [2014] eKLR where the Court held that failure by an employer to produce statutory employment records permits the Court to accept the employee's version of events. Similarly, in Nicholas Muasya Kyula v Farmchem Limited [2012] eKLR the Court observed that an employer who does not keep proper employment records cannot evade liability by shifting the burden of proof to the employee.

9. In the present case, the Respondent did not produce duty rosters, attendance registers, or any records to demonstrate the Appellant's working hours or rebut his claims of work on Sundays and public holidays. In the absence of such records, the trial Court erred in treating the claim as an ordinary claim for special damages without recognizing the statutory shift in the burden of proof. This Court finds that the trial Court misdirected itself in law by failing to apply sections 10(7) and 74 of the *Employment Act* and by imposing upon the Appellant a burden that the law clearly places on the employer.

10. The Appellant also claimed that he was not paid house allowance, while the Respondent asserted that his salary was consolidated and inclusive of house allowance, in compliance with the applicable Regulation of Wages Order. Section 31(1) of the *Employment Act*, 2007 obligates an employer to either provide reasonable housing accommodation or pay the employee a housing allowance in addition to wages or salary. The law is settled that an employer alleging salary consolidation bears the burden of demonstrating that the consolidation was clear, lawful, and communicated to the employee. This principle was affirmed in Grain Pro Kenya Inc Ltd v Andrew Waithaka Kiragu [2019] eKLR, which held that house allowance is a statutory entitlement unless expressly shown to have been consolidated. Likewise, in Mayende v African Medical and Research Foundation (AMREF) [2016] eKLR the Court held that mere payment of a salary above the minimum wage does not prove inclusion of house allowance unless pay slips or contracts expressly indicate so.

11. In this case, the Respondent failed to produce the Appellant's contract, pay slips, or any documentation showing that the salary paid was consolidated or inclusive of house allowance. Reliance on the Regulation of Wages Order without supporting employment records is insufficient to discharge the statutory burden placed upon the employer under sections 10(6), 10(7), and 74 of the *Employment Act*, 2007. This Court finds that the trial Court erred in accepting the assertion of consolidation without documentary proof and in shifting the burden of proof to the Appellant, contrary to statutory requirements.

12. The Appellant's claim for service pay was based on the assertion that he was not registered with NSSF or any other pension or provident fund. Section 35(5) of the *Employment Act* provides for service pay upon termination of employment, while section 35(6) expressly excludes employees who are members of NSSF, a registered pension scheme, or any other exempted scheme. The legal position is settled that once an employee alleges non-membership in NSSF or a pension scheme, the burden shifts to the employer to demonstrate registration and remittance, as was stated in Nzioka v Smart Coatings Limited [2017] eKLR, where the Court held that proof of NSSF registration lies with the employer. In Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Limited [2013] eKLR, the Court emphasized that an employer who fails to produce evidence of statutory remittances cannot defeat a claim for service pay.

13. In the present case, the Respondent did not produce NSSF statements, registration certificates, or remittance schedules to demonstrate that the Appellant was a member of NSSF or any exempt scheme. The trial Court therefore erred by applying the general rule that "he who alleges must prove," without appreciating the provision of Section 47(5) of the *Employment Act*, 2007 which comes out as follows;

> " For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

14. Accordingly, this Court finds that the trial Court misdirected itself in law by shifting the burden of proof to the Appellant in respect of overtime, house allowance, and service pay, contrary to the *Employment Act* and binding case law.

15. I am therefore inclined to allow the appeal and award relief as follows;

    i. Service pay Kshs.42,445.00

    ii. Overtime Kshs.223,448.50

    iii. House allowance= 15/100 x Kshs.16978.00 x 60months..... ..Kshs.152,802.00

    Total of award.....Kshs.418,810.00

    iv. Each party shall bear their costs of this appeal.

DELIVERED, DATED AND SIGNED THIS 28TH DAY OF JANUARY 2026.

D. K. NJAGI MARETE

JUDGE

Appearances:

Mr. Isindu instructed by Burtun Isindu & Company Advocates for the Appellant.

Miss Musungu instructed by Makenzi Mukungu & Company Advocates for Respondent.