



**Karanja v Radar Limited (Appeal E036 of 2025)
[2026] KEELRC 247 (KLR) (23 January 2026) (Judgment)**

Neutral citation: [2026] KEELRC 247 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL E036 OF 2025
AN MWAURE, J
JANUARY 23, 2026**

BETWEEN

MARION WAMAITHA KARANJA APPELLANT

AND

RADAR LIMITED RESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable Emmanuel S. Soita, Senior Resident Magistrate, delivered on 8th July 2025 in Nakuru CM ELRC No. E123 of 2021)

JUDGMENT

1. The Appellant, being dissatisfied with the judgment and decree of the Honourable Emmanuel S. Soita, Senior Resident Magistrate, filed this appeal vide a Memorandum of Appeal dated 9th July 2025 on the following grounds: -
 1. The learned trial magistrate erred in law and in fact in classifying the reliefs of overtime, off duty, public holidays and leave as continuing injuries under section 90 of the [Employment Act](#), hence to deny the Appellant the said deserving reliefs.
 2. The learned trial magistrate erred in law and in fact in holding that the relief of leave had not been proved, yet the Respondent, yet from their statement and evidence in court, duly admitted that the Appellant had not gone for leave for the entire period she worked with them.
 3. The learned trial magistrate erred in law and in fact in erroneously deciphering that the Appellant had forfeited entitlement to leave on the basis that she did not go for leave.
 4. The learned trial magistrate erred in law and in fact in holding that the Appellant had not proved that she worked overtime despite the Respondent testifying and relying on terms of agreement which indicated that the working days and hours were altered and changed without consent and knowledge of the Appellant.



5. The learned trial magistrate erred in law and in fact in failing to note that the Respondent had not presented records to substantiate the Appellant not having worked for the days and hours claimed irrespective of the revelation that the recording and alteration of the working days and hours occurred without the knowledge and consent of the Appellant and this was against the provision of section 10(7) of the *Employment Act*.
 6. The learned trial magistrate erred in law and in fact in failing to properly guided that the contemplated record will have enabled the court to ascertain whether the inordinate changes were consistent with the regulations of working hours.
 7. The learned trial magistrate erred in law and in fact in awarding the Appellant 3 months as compensation for unlawful termination, yet the Appellant had served the Respondent for a period of more than 5 years.
 8. Though the grant of the number of months on compensation under section 49(1)(c) of the *Employment Act* is discretionary, the trial court erred in not substantiating the 3 months, yet the Appellant had not contributed in any way for her termination from employment.
2. The Appellant prays that:
- a. The court enhances the relief of overtime, off duties, public holidays and leave
 - b. The court is to enhance the relief on compensation.
 - c. Costs of the Appeal be borne by the Respondents.
 - d. Interest to apply from the date of the judgment of the trial court.
3. The appeal was disposed of by way of written submissions.

Appellant's submissions

4. The Appellant submitted that the trial court held that claims for underpayment, overtime, off-duty, public holidays, and leave were time-barred. The Appellant also submitted that this was erroneous as the claim was filed within 1 year and 5 months after termination, that is, between December 2019 and March 2021, well within the 3-year limitation period under section 90 of the *Employment Act*. The Appellant argued that no preliminary objection was raised on limitation before the hearing, and these claims are stand-alone entitlements, not continuing injuries, hence not barred.
5. The Appellant submitted that leave and overtime were proved. The Appellant relied on sections 10(7) and 74(1)(e)(f) *Employment Act*, which provides that the burden of proof lies on the employer to produce employment records, which the Respondent failed to produce; hence, the claims should stand.
6. The Appellant submitted that she is entitled to leave, public holidays and off-duty. In *James Ondima Kabesa V Trojan International Limited* [2017] KEELRC 1960 (KLR), the court held that:

“The claimant prayed for leave for 4 years. The Respondent did not prove its allegation that, according to the Human Resources Policy that leave not taken is forfeited. No copy of the Human Resource Policy was provided. Even if it was, the court would have still have to satisfy itself on the provision that it is compliant with section 28 of the *Employment Act*, failing which it would be invalid. I award the Claimant pay in lieu of 21 days annual leave per year for 4 years, being Kshs. 126,000/=.



7. In *Titus Kavoi V Kenya Meat Commission* [2024] KEELRC 1915 (KLR), the court held that the Respondent argued that the Appellant had forfeited all accrued leave, but the trial court's finding was questionable since, despite acknowledging that the appellant had 32 leave days, it denied the entitlement without any supporting documentation. The record contained no evidence to justify forfeiture, and as emphasized by Rika J in *John Kyalo Mulela V Pan African Logistics Ltd* [2017] eKLR, the *Employment Act* does not recognize forfeiture of annual leave, which must either be taken or compensated in cash. Accordingly, the appellant was awarded leave pay for 32 days.
8. The Appellant maintained that she worked continuously from 1st February 2014 to December 2019, a period of 71 months, and noted that the Respondent did not adduce evidence to dispute this timeline. The Respondent's witness statement did not contradict her testimony. While the applicable wage orders during that period were Legal Notices 197 of 2013, 117 of 2015, 112 of 2017, and 2 of 2019, the respondent acknowledged that her salary was Kshs.18,000/=, which therefore became the operative wage for the case.
9. The Appellant submitted that she is entitled to Kshs. 1,026,830/= for overtime, Kshs.684,553.85 for off duties, Kshs.144,000/= for public holidays, Kshs.74,550/= and compensation for unfair termination for 7 months, amounting to Kshs.126,000/=.
10. The Appellant urged this Honourable Court to allow the Appeal as prayed.

Respondent's submissions

11. The Respondent submitted that the trial court did not err in making a finding that the claims for underpayment, overtime, public holidays, and leave as falling on section 90 of the *Employment Act*. The Respondent placed reliance on the Court of Appeal of *Divecon Ltd V Samani* [1995-1998] 1 EA 48 at 54 held as follows:

“.... no one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action found on contract. The collar to this is that no court may or shall have the right or power to entertain what cannot be done, namely, an action that is brought in contract six years after cause of action arose or any application to extend such time for the bringing of the action..... A perusal of part III shows that its provisions do not apply to actions based on contract. In the light of these clear statutory provisions, it would be unacceptable to imply, as the learned Judge of the Superior Court did, that “the wording of section 4(1) of the Limitation of Actions.”
12. In *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] KECA 827 (KLR), the Court of Appeal held as follows:

“Regarding ‘a continuity injury’ the proviso to section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuity injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned judge erred in concluding that the claims had no limitation of time. Further, upon the Claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.”
13. On proof of reliefs, the Respondent contended that the Appellant failed to provide particulars of evidence, to show that overtime and public holidays claims must be specific, credible, and supported by evidence. The Respondent placed reliance on *Rogoli Ole Manadiegri V General Cargo Services*



- Limited [2016] KEELRC 1607 (KLR) where the court stated that although employers are custodians of employment records, an employee claiming overtime pay must still prove the specific hours or days worked beyond the legal maximum. The burden of proof rests with the employee, who must provide clear evidence of overtime, public holiday, or rest day work. In the cited case, the claimant failed to justify the global overtime figure or demonstrate how it was calculated, leading the court to reject the claim.
14. In *Luka Mbuvi V Economic Industries Limited* [2020] KEELRC 1167 (KLR), the court held that section 28(4) of the *Employment Act*, there are limits on how many leave days an employee can carry forward. In the cited case, the claimant failed to show whether leave days had been carried forward with the employer's permission during the four years of service. As a result, the court only allowed pro-rated leave for the four months worked in 2015, rather than granting the full claim.
 15. In *Ngunda V Ready Consultancy Limited* [s2022] KECA 577 (KLR), the Court of Appeal held that the claimant's demand for payment covering 33 public holidays, 152 Sundays, and 5,184 hours of overtime was dismissed because it lacked credible evidence and proper documentation. The court noted that no proof was provided to show the claimant actually worked on those specific days, nor was there a breakdown of the overtime hours to demonstrate how the figure was calculated. It was deemed implausible and humanly impossible for the claimant to have continuously worked all those hours, and the principle applied was that the burden of proof rests with the person making the claim. This is the trite law in Sections 107-109 of the *Evidence Act* that he who alleges must prove.
 16. In *Simeon Omariba Orangi V Robinson Investment Limited* [2019] KEELRC 376 (KLR), the court stated as follows:

“With regard to overtime claims for work for 12 hours each day, the Principle Wage Orders and applicable for the period before the enactment of the *Private Security Regulation Act*, 2016 which fundamentally reviewed the Regulation of Wages (Protective Security Services) Order 1998 and read together with the General Order LN/No. 120/82 provides for sixty hours of work, spread over six days a week for night guards. However, the practice had been for various employers to vary terms and conditions, giving employees and security guards various benefits in this regard and applying different work hours. The legal minimum only changed with the enactment of the *Private Security Regulation Act* of 2016. See *Kenya National Private Security Workers' Union versus Kenya Kazi Security Services Limited* [2013] eKLR, the claims premised on overtime, these being regulated, the court finds on basis.”
 17. On termination, the Respondent argued that the employment was contingent on third party contracts to justify automatic termination upon the lapse of the subcontract, and submitted that three months' compensation was fair. The Respondent placed reliance on *Jared Magera & 11 Others v Professional Clean Care Limited* [2018] KEELRC 971 (KLR) and *Eric Odhiambo Owade & 2 others V Professional Cleaning Care Limited* [2018] KEELRC 1838 (KLR), where the courts upheld that automatic termination clauses tied to subcontract lapses.
 18. The Respondent maintains that the award of three months' compensation was proper placing reliance on *Kioko Joseph (Suing as the legal representative of the Estate of Joseph Kilinda) V Bamburi Cement Ltd* [2017] KECA 360 (KLR) where the court stated that the award be subjected to the statutory deductions as provided under section 49(2) of the *Employment Act*.
 19. For costs, the Respondent placed reliance on *Cecilia Karuru Ngayu v Barclays Bank of Kenya* [2014] eKLR in support of that proposition, and ultimately prays that the appeal be dismissed with costs.



Appellant's supplementary submissions

20. In the supplementary submissions, the Appellant reiterates that her claim was filed within the statutory three-year period under section 90 of the *Employment Act*, and that the Respondent misapplied *G4S Security Services (K) Ltd V Joseph Kamau & 468 Others (Supra)*, which actually held that unpaid dues do not constitute a continuing injury and must be filed within three years. She further submitted that *Divecon Ltd V Samani (Supra)* is inapplicable, and her ground of appeal on limitation is merited.
21. On the substantive claims, the Appellant maintains that only the reliefs for off duties and public holidays were found unproved, while overtime and leave stood proved, and that the Respondent's arguments on leave entitlement are misplaced since payment for leave not taken is mandatory.
22. The Appellant concludes that the Respondent's reliance on additional authorities is alien to the trial court's judgment, reiterates that her appeal is properly grounded, and prays that it be allowed.

Analysis and determination

23. Being the first appeal, it is well settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the lower court on both on points of law and fact and come up with its own findings and conclusion set out in the cases of *Peters V Sunday Post Limited [1958] E. A 424* and *Selle and Another V Associated Motor Boat Company Ltd & Others [1968] 1 E.A 123*.
24. Having considered the records of appeal, the memorandum of appeal, and the submission by both parties, the issue for determination is whether the appeal is merited as per the issues of diversion presented by the Appellant.
25. Section 89 of the *Employment Act* provides as follows:

“Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

26. The Appellant argued that she is entitled to the claims for overtime, off duty, public holidays and leave as they are continuing injuries, while the Respondent argued that the claims are time barred. The court is of the view that the claims are not time-barred, as the claims were filed within the time frame required by law as provided in Section 89 of the *Employment Act*.
27. Sections 107, 108 and 109 of the *Evidence Act* provide that whoever alleges must prove. In *Rogoli Ole Manadegi V General Cargo Services Limited (Supra)*, the court held that “there was no sufficient evidence that overtime was not provided despite the employer not having produced any counter-evidence.” Further, the court held that “the court is not able to agree with the Appellant on this ground. It is true that the employer is the custodian of Employment records. The employee is claiming overtime pay however it is deemed to establish claim for overtime pay by default if the employer bringing to court such employment records.”

“The burden of establishing hours or days worked in excess of the legal maximum rests with the employer.”



Finally, in the above case, the court held that the Appellant gave no consistent evidence showing the hours worked, and how those hours gave rise to a figure of Kshs.222,350/= claimed as the overall overtime.

28. Guided by the foregoing, the court perusing the statement of the claim the Appellant provided absolutely no factual evidence to prove underpayment claims for overtime, off days, unpaid leave days and public holidays. These are alluded in the claim but are not proved or even shown how they are arrived at. There may be figures quoted in the Applicant's submissions but from the initiation of the suit there were no factual documents to support the claim.

The claim for overtime is not established and is declined.

29. On the claim for annual leave, section 28 of the *Employment Act* provides that Employees are entitled to at least 21 working days of paid annual leave after 12 months of continuous service, or 1¾ days of paid leave for each completed month if employment ends after two or more months within a leave-earning year. With the employee's consent, annual leave may be split into parts, but one portion must be at least two uninterrupted weeks. The uninterrupted part must be taken within the 12-month service period, while the remainder should be used within 18 months thereafter. If a contract grants leave beyond the statutory minimum, the employer and employee may agree on how those extra days are utilized. In this instant case, the Appellant argued that she is entitled to the said claim, while the Respondent argued that she is not entitled to the same. The court is of the view that the Appellant did not prove she applied for leave and she was denied. It is usually the employee who applies for leave and only if it is consistently denied that then the employer should compensate.

The employee from February 2015 when she was employed upto 2019 did not seem to have applied for any leave. In absence of any proof, the court would find also the prayer for unpaid leave is also unproved and is also not granted.

30. Regarding the claim for public holidays, the court relies on the case of *Cesar Warui v Sirona Hotel Limited* [2018] KEELRC 561 (KLR), in which the court held that the Claimant failed to specify the holidays allegedly worked and provided no evidence to show that he actually worked on all those holidays over the eight-year period. Consequently, the claim for payment for public holidays is rejected. The court is of the view that there was no sufficient evidence to show that the Appellant worked on the public holidays.
31. Furthermore, on the claim for off-duty, the court relied on the case of *Kenya Guards and Allied Workers Union V Lavington Security Limited* [2013] KEELRC 595 (KLR), the court held that the claim for off duty was dismissed as the same was not proved. The court in these cases would not grant awards if there is no evidence to support the same. In this case, there is no evidence to support all these claims of overtime, off duty, public holidays and unpaid leave.
32. The Appellant is awarded five months compensation for unlawful termination having worked for the Respondent from the year 2015 to 2019. The Appeal therefore is not merited except to review the award for unlawful termination upward from Kshs.54,000/= to Kshs.90,000/= and salary of Kshs.18,000/= in lieu of notice. The total award is Kshs.108,000/=.
33. The Respondent will pay the costs of the lower court proceedings. Each party will meet their respective costs of the Appeal.
34. The award attracts interest at 14% per annum from date of this judgment until full payment.
35. The Appellant to be given his certificate of service within 30 days from today's date.



Order accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23RD DAY OF
JANUARY 2026.**

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

