



REPUBLIC OF KENYA



**Philip & 10 others v Proto Energy Limited (Cause E1060 of 2021)
[2026] KEELRC 110 (KLR) (23 January 2026) (Judgment)**

Neutral citation: [2026] KEELRC 110 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1060 OF 2021**

**JW KELI, J
JANUARY 23, 2026**

BETWEEN

**JOHN KYALO PHILIP 1ST CLAIMANT
SAMSON MULI MASENGO 2ND CLAIMANT
JIMMY MULONGO WANYAMA 3RD CLAIMANT
MICHAEL GATHINGI MWANGI 4TH CLAIMANT
GUYO TADICHA GODANA 5TH CLAIMANT
FELISTAS KAVENI KYALO 6TH CLAIMANT
NELSON NDEREVA NJUE 7TH CLAIMANT
ENOCK AGUTA ONSANDO 8TH CLAIMANT
MARTIN MWENDA KIRITHI 9TH CLAIMANT
SIMON KONGINA NAWIY 10TH CLAIMANT
OURU MOREKA WYCLIFF 11TH CLAIMANT**

AND

PROTO ENERGY LIMITED RESPONDENT

JUDGMENT

1. Vide an amended statement of claim dated the 13th of November 2023, the Claimants sued the Respondent and sought the following Orders:-
 - a. A declaration that the termination of each Claimant's services with the Respondent was wrongful, unconstitutional, unjustifiable, illegal and or unfair.



- b. A declaration that any statements agreed to by the claimants that payments made to them were in full and final statements of all claims they had against the respondent are null and void as there was no consensus ad idem between the Claimants and Respondent.
 - c. An order for compensation to each Claimant for wrongful, unlawful and/ or unfair termination of employment at the statutory rate of 12 months' salary as more particularly calculated below:
 - i. 1st Claimant- Ksh 35,000 multiply by 12 = 420,000/=
 - ii. 2nd Claimant- Ksh 35,000 multiply by 12 = 420,000/=
 - iii. 3rd Claimant- Ksh. 35,000 multiply by 12 = 420,000/=
 - iv. 4th Claimant- Ksh. 31,500 multiply by 12 = 378,000/=
 - v. 5th Claimant- Ksh. 31,500 multiply by 12 = 378,000/=
 - vi. 6th Claimant - Ksh, 31,500 multiply by 12 = 378,000/=
 - vii. 7th Claimant- Ksh. 31,500 multiply by 12 = 378,000/=
 - viii. 8th Claimant - Ksh. 31,500 multiply by 12 = 378,000/=
 - ix. 9th Claimant - Ksh. 31,500 multiply by 12 = 378,000/=
 - x. 10th Claimant- Ksh. 80,500 multiply by 12 = 960,000/=
 - xi. 11th Claimant- Ksh. 31,500 multiply by 12 =378,000/=
 - d) In the alternative, the 7th and 9th Claimants pray for an order for compensation for wrongful, unlawful and/ or unfair termination of employment by being paid salary for the nine (9) months being the remaining months in their respective contracts.
 - e) An order that the Claimants be individually compensated by payment of overtime dues in arrears from the dates of their individual employment to that of termination as tabulated in the particulars of the Claimants' overtime dues above;
 - f) General damages;
 - g) Interests on the amounts prayed for in c, d and e above;
 - h) Costs of this Suit; and
 - i. Such other relief as this Honourable Court may deem just and fit.
2. The Claimants in support of their claim filed their list of documents dated 23rd August 2024 with the bundle of documents attached; list of witnesses dated 23rd August 2024; and witness statements of each Claimant all dated 23rd August 2024, and well as that of MAJOR (RTD) SAMUEL OLE TOLU dated 13th December 2023.
 3. The Respondent entered appearance through the firm of Munyao Muthama and Kashindi Advocates and filed an amended statement of response dated 17th June 2025. In support of the said amended statement of response the Respondent filed a witness statement of CATHERINE MWANIKI dated 19th September 2023; a list and bundle of documents dated 19th September 2023; a supplementary bundle of documents dated 19th November 2024; and another supplementary list and bundle of documents dated 17th June 2025.



4. In response to the Respondent's amended statement of response, the Claimant filed a reply dated 23rd June 2025.

Hearing and evidence

5. The dispute was referred to court-annexed mediation. The parties settled and filed a partial consent dated 26th May 2025 as follows- 'The Respondent shall pay an equivalent of two (2) salary to each of the Claimants in full and final settlement of the claim and reliefs sought under Paragraphs A, B, C, D, F, G and I of the Claimants Amended Statement of Claim dated 13th November 2023; 2. The Claims and reliefs sought under paragraphs A, B, C, D, F, G and I of the Claimants Amended Statement of Claim dated 13th November 2023 shall be deemed to be duly settled according to the terms of this consent. 3. Costs with respect to the settled part of the claim shall be in the cause.. 4. The Claim for overtime dues as sought under paragraph E of the Amended Statement of Claim dated 13th November 2023 be and is hereby referred to the honorable court for determination.....''
6. The parties filed a further consent dated 5th day July 2025 which was adopted as Order of the court as follows- 'by consent between the Claimants and the Respondent herein; the Parties have agreed to record a further Consent in the following specific terms:
 1. That the Parties shall proceed with hearing of the pending bit of the matter (determination of the claim for Over time and costs of the Suit) in terms of Rule 59 of the Employment and Labour Relations Court (Procedure) Rules to wit adoption and basing reliance on the Documents filed by the respective parties.
 2. That subsequent to production of the Documents by consent; the parties be at liberty to file their respective written submissions.'

The Claimants' case in summary

7. The Claimants' case is that they were employed by the Respondent on diverse dates in various positions on contract and permanent basis as follows:
 - a. The 1st Claimant was employed by the Respondent to the position of Security Officer at a monthly salary of Kshs. 35,000/- vide a contract dated 7th January 2019 which was renewed severally, with the final extension slated to expire on 31st July 2021.
 - b. The 2nd Claimant was employed by the Respondent to the position of Security Officer at a monthly salary of Kshs. 35,000/- vide a contract dated 1st February 2019 which was renewed severally, with the final extension slated to expire on 30th July 2021.
 - c. The 3rd Claimant was employed by the Respondent to the position of Security Officer at a monthly salary of Kshs. 35,000/- vide a contract dated 4th March 2019 which was renewed severally, with the final extension slated to expire on 30th July 2021.
 - d. The 4th Claimant was employed by the Respondent to the position of Security Officer at a monthly salary of Kshs. 31,500/- vide a contract dated 19th August 2020 slated to expire on 31st July 2021.
 - e. The 5th Claimant was employed by the Respondent to the position of Motorbike Security Rider at a monthly salary of Kshs. 31,500/- vide a contract dated 15th March 2021 slated to expire on 14th March 2022.



- f. The 6th Claimant was employed by the Respondent to the position of Security Officer at a monthly salary of Kshs. 31,500/- vide a contract dated 3rd August 2020 slated to expire on 30th July 2021.
 - g. The 7th Claimant was employed by the Respondent to the position of Motorbike Security Rider at a monthly salary of Kshs. 31,500/- vide a contract dated 15th March 2021 slated to expire on 14th March 2022.
 - h. The 8th Claimant was employed by the Respondent to the position of Security Officer at a monthly salary of Kshs. 31,500/- vide a contract dated 6th August 2020 slated to expire on 30th July 2021.
 - i. The 9th Claimant was employed by the Respondent to the position of Motorbike Security Rider at a monthly salary of Kshs. 31,500/- vide a contract dated 15th March 2021 slated to expire on 14th March 2022.
 - j. The 10th Claimant was employed by the Respondent to the position of Security Officer at a monthly salary of Kshs. 80,000/- on permanent basis commencing on 8th February 2021 until 31st January 2022.
 - k. The 11th Claimant was employed by the Respondent to the position of Security Officer at a monthly salary of Kshs. 31,500/- on permanent basis commencing on 1st October 2019.
8. On 14th July 2021, the Claimant's state that the Respondent terminated their services en masse without prior reasonable notice and without any legal or moral justification. According to the Termination Notice dated 14th July 2021 issued to the Claimants, the Respondent terminated their employment on account of redundancy. The Claimants complain that prior to their termination on account of redundancy, the Respondent carry out consultations by engaging them jointly and/ or individually on any discussion with regard to any changes that were about to occur in the Company as alleged in the Termination Letters.
 9. The Claimants aver that the Termination Letters dated 14th July 2021 purported to enumerate the benefits payable to the Claimants as: payment for the days worked up until 13th August 2021; payment for accrued and unutilized leave days as at 13th August 2021; severance pay for fifteen days for every complete year of service with the company from the date of joining; one month's pay in lieu of notice; less damage or surcharge if any; and any other monies the company may owe the Claimants. Through the same Termination Letters, the Claimant's were also assured that they would be furnished with their individual Certificates of service.
 10. The Claimants' grievance is that the Respondent's purported "Strategic plan and performance contracting leading to restructuring and reorganization of operations" which is advanced as the reason for the Claimant's dismissal by the Respondent was not brought to the Claimants' attention nor were they invited to be actively involved in the process prior to their termination. Further, the Respondent did not comply with the requirements of Section 40 of the *Employment Act* No 11 of 2007 on redundancy as the Labour Officer was never informed of the impending terminations of employment, and the Respondent did not consider seniority in time, skill, ability and reliability while selecting the employees to declare redundant. Moreover, the Respondent immediately after their termination from employment replaced them with other individuals who did the work previously allocated to them, such that their individual positions were never extinguished as alleged. As such, they are adamant that this was not a case of termination under redundancy, but rather a simple case of unfair termination.



11. The Claimants raise an issue that they worked overtime for the Respondent during the pendency of their employment, but were never paid overtime dues. The number of hours the Claimants should have worked were 52 hours a week spread over 6 days as set out in their individual employment contracts. However, they worked 12 hours a day from 6.00 am to 6.00 pm or vice versa, for 6 days a week. They claim overtime dues as follows:
- a. The 1st Claimant worked 12 hours a day for 6 days a week, hence tabulates his total overtime hours as 3144 hours, and his unpaid overtime dues as Kshs. 792,288/- based on the overtime rate of 1.5 times his hourly salary.
 - b. The 2nd Claimant worked 12 hours a day for 6 days a week, hence tabulates his total overtime hours as 3068 hours, and his overtime dues as Kshs. 773,136/- based on the overtime rate of 1.5 times his hourly salary.
 - c. The 3rd Claimant worked 12 hours a day for 6 days a week, hence tabulates his total overtime hours as 2964 hours, and his overtime dues as Kshs. 746,928/- based on the overtime rate of 1.5 times his hourly salary.
 - d. The 4th Claimant worked 12 hours a day for 6 days a week, hence tabulates his total overtime hours as 1056 hours, and his overtime dues as Kshs. 239,184/- based on the overtime rate of 1.5 times his hourly salary.
 - e. The 5th Claimant worked 12 hours a day for 6 days a week, hence tabulates his total overtime hours as 416 hours, and his overtime dues as Kshs. 94,224/- based on the overtime rate of 1.5 times his hourly salary.
 - f. The 6th Claimant worked 12 hours a day for 6 days a week, hence tabulates his total overtime hours as 1200 hours, and his overtime dues as Kshs. 271,800/- based on the overtime rate of 1.5 times his hourly salary.
 - g. The 7th Claimant worked 12 hours a day for 6 days a week, hence tabulates his total overtime hours as 416 hours, and his overtime dues as Kshs. 94,224 based on the overtime rate of 1.5 times his hourly salary.
 - h. The 8th Claimant worked 12 hours a day for 6 days a week, hence tabulates his total overtime hours as 1196 hours, and his overtime dues as Kshs. 270,894/- based on the overtime rate of 1.5 times his hourly salary.
 - i. The 9th Claimant worked 12 hours a day for 6 days a week, hence tabulates his total overtime hours as 416 hours, and his overtime dues as Kshs. 94,224/- based on the overtime rate of 1.5 times his hourly salary.
 - j. The 10th Claimant worked 12 hours a day for 6 days a week, hence tabulates his total overtime hours as 600 hours, and his overtime dues as Kshs. 346,500/- based on the overtime rate of 1.5 times his hourly salary.
 - k. The 11th Claimant worked 12 hours a day for 6 days a week, hence tabulates his total overtime hours as 2236 hours, and his overtime dues as Kshs. 506,454/- based on the overtime rate of 1.5 times his hourly salary.
12. The Claimants state that the Respondent violated their Constitutional right under Article 41 of *the Constitution*, as read together with Section 40 of the *Employment Act* on redundancy.



Respondent's case in brief

13. The Respondent admits that the Claimants were its employees under different job terms and descriptions as follows:
- a. The 1st Claimant was employed as a Security Officer on a fixed term contract from 1st August 2020 to 31st July 2021. His gross salary was Kshs. 25,000/- per month and he was paid a shift allowance of Kshs. 10,000/- subject to statutory deductions.
 - b. The 2nd Claimant was employed as a Security Officer from 1st August 2020 to 31st July 2021. His gross salary of Kshs. 25,000/= per month and he was paid a shift allowance of Kshs. 10,000/- subject to statutory deductions.
 - c. The 3rd Claimant was employed as a Security Officer on a one-year contract basis, with a 3-months' probationary period from 1st August 2020 to 31st July 2021. His gross salary of Kshs. 25,000/= per month and he was paid a shift allowance of Kshs. 10,000/- subject to statutory deductions.
 - d. The 4th Claimant was employed as a Security Officer from 19th August 2020 on a one-year contract basis with a 6-months probationary period. His gross salary was Kshs. 26,500/- per month and he was paid a shift allowance of Kshs. 10,000/- subject to statutory deductions.
 - e. The 5th Claimant was employed by the Respondent as a Motorbike Security Driver from 15th March 2021 on a one-year contract basis, with a 6-months' probationary period. He was entitled to a gross salary of Kshs. 31,500/- per month inclusive of all allowances and subject to statutory deductions.
 - f. The 6th Claimant was employed as a Security Officer from 3rd August 2020 on a one, year fixed term contract. The Claimant earned a gross salary of Kshs, 26,500/- and he was paid a shift allowance of Kshs. 5,000/- subject to statutory deductions
 - g. The 7th Claimant was employed as a Motorbike Security Rider from 15th March 2021 on a one-year fixed term contract. He was entitled to a gross salary of Kshs. 31,500/- per month inclusive of all allowances and subject to statutory deductions.
 - h. The 8th Claimant was employed as a Security Officer from 6th August 2020 on a one-year fixed term contract with a gross salary of Kshs, 26,500/- and he was paid a shift allowance of Kshs. 5,000/- subject to statutory deductions.
 - i. The 9th Claimant was employed as a Motorbike Security Rider from 15th March 2021 on a one-year contract and was entitled to a basic salary of Kshs. 31, 500/- per month inclusive of all allowances and subject to statutory deductions.
 - j. The 10th Claimant was employed by the Respondent as a Security Supervisor from 8th February 2021 on a one-year fixed term contract basis with a monthly gross salary of Ksh. 80,000/- inclusive of all allowances and subject to statutory deductions.
 - k. The 11th Claimant was employed as a Security Officer from 1st October 2019 on a fixed term contract earning a gross salary of Kshs. 26,500/- and a house allowance of Kshs. 5,000/- per month, subject to statutory deductions.



14. On 13th August 2021 the Claimants' employment contracts were terminated on account of redundancy since the Respondent experienced cashflow challenges making it difficult to keep the Company afloat. These forced the restructuring and reorganization of the Company.
15. The Respondent issued the Murang'a County Labour Office with a redundancy notice dated 10th May 2021 stating that restructuring of the business operations would affect 42 positions within the Respondent company, including the Claimant's positions. The process would run from 17th June 2021 until 3rd July 2021. Subsequently, the Respondent issued the Claimants with notices of intended redundancy dated 14th July 2021 giving them 30 days' notice. The Claimants' services were terminated after the lapse of the notice of intention to declare redundancy on 13th August 2021. The Claimants were therefore informed of the intended redundancy and given reasonable notice.
16. It is the Respondent's case that both the notice of intention to declare redundancy and notice to terminate were issued procedurally and in compliance with the provisions of the employment Act, the contracts as well as the Respondent's Human Resource Policies and Procedures Manual which provide that an employee declared redundant shall be entitled to not less than one month's notice or one month's wages in lieu thereof. Contrary to the Claimants' allegations, the Respondent conducted consultations with the Claimants prior to the termination. Since all the Claimants were employed in the security department, there was no selection criteria needed.
17. After the Claimants' termination from employment as aforesaid, they were paid all their terminal benefits as enumerated in the termination notices dated 14th July 2021 as particularized by the Claimants. The Respondent's termination of the Claimants' employment was in line with the Respondent's strategic plan and performance contracting which necessitated the restructuring and reorganization of operations.
18. On the issue of overtime payments, it is the Respondent's case that each Claimant worked within the hours stipulated in their contracts. No Claimant worked overtime. They affirm that after the Claimants' positions were declared redundant, the Respondent did not replace the Claimants with other employees, since the Claimants' positions ceased to exist. The Respondent urges the court to dismiss the claim before it for the reasons that the termination of the Claimants' employment was fair and in line with Section 40 of the Employment Act, 2007; there were justifiable reasons for restructuring the organization; there were consultations with the Claimants prior to the separation; the Claimants were paid all their accrued dues and benefits; the redundancy was conducted procedurally; and the termination of employment was fair and lawful.

Determination

19. The outstanding issue for determination is the claim for overtime and costs as per the further consent dated 5th July 2025.

Claimant's submissions

20. Whether the claimants are entitled to overtime pay and if so, how much? It is not in dispute that the Claimants were employed as security guards at the Respondent. In each of the Claimants Witness Statements which are not controverted; the contention is that they worked for a period of 12 hours on a daily basis for 6 days a week with one day being availed to the for rest. In each of the month while in employment; the said claimants put in a total of 26 work days in each of the said months. This position is buttressed by the provision of each of the claimant's letter of employment under the term on "Hours of Work". In the Claimants pleadings read together with their individual witness statements; it comes out clearly that they worked for 12 hours before they could be relieved by their



colleagues who were on duty on the previous shift of two hours. We invite this honorable court to examine the Respondents Amended Statement of Response dated 17th June 2025. At paragraph 16 (d) the Respondents has averred that the 1st, 2nd, 3rd, 4th, 5th, 6th 8th and 11th Claimants received Shift Allowances which it argues constituted or is to be equated to overtime allowance. Shift allowance was distinct from overtime. This kind of allowance was an additional payment that the employer made to their employee for working during unsociable hours. This is why we have the claimants entitled to both overtimes as well as shift allowance. At this Juncture, we would like to invite the honorable court to consider the contracts of employment for the 4th, 5th, 7th, 9th, and 11th Claimants. All of these employees had an express clause of overtime in their contracts of employment. Moreover; in the Pay Slips supplied by both the Claimant and respondent; there is a payment for overtime paid to the employees as well as that of shift allowance. It is extremely critical at this juncture to point it out clearly that the Claimants were entitled to over time payment for work done on rest days and public holidays as well as extra hours worked on ordinary days. Conspicuous in this matter is that from the particularization of overtime being demanded by the Claimant is that of ordinary days whose multiplier is *1.5 times and NOT that of holidays as well as rest days whose multiplier is *2. To prove that they indeed worked for extra hours to be entitled to overtime pay; the Claimants stated in their statements as such in their statements. Moreover; they called the evidence of the overall Supervisor one Major Ole Tolu [See Witness Statement of Major (Rtd) Samuel Ole Tolu dated 13th December 2023 being Item No. 54 in the Claimants Bundle of Document and found at pages 140 - 142 of the Claimants Bundle] who is not a party in this matter and who unequivocally stated thus: "...THAT as a practice; the day Shift could begin at 6.00 am in the morning and end at 6.00 pm in the evening when the guards who were handling the night shift could report in the evening. As such; all the guards were working for a total of 12 hours every day..." "... THAT on each particular day; the Guards who report in the morning could cloak in at 6.00 am and note down in an Occurrence book availed at each of the 9 points of concern that they had indeed taken over from their colleague counterpart who were on duty at night. The other ones who were working at night could therefore cloak out hand over and proceed to their homes for them to report back at 6.00 pm in the evening when they could take over. It was a requirement to have the handing over recorded in the Occurrence Book..." ..THAT I wish to state that in the security department which I headed, there were only two shifts being the day shift (dubbed Green Shift) which run from 6.00 am in the morning and ended at 6.00 pm in the evening. The next shift - Night Shift (Blue Shift) could begin at 6.00 pm in the evening and end at 6.00 am in the following morning. Due to the nature of the Security work, all Guards were mandatorily required to leave their work station only after handing over. This therefore means that they were all working for 12 hours on each and every day they were at work..." "... THAT the question of absenteeism was taken very serious considering the nature of work which was provision of security for the plant. I therefore wish to state that all the points of concern within the Respondents concern were attended to at all times. Moreover; while I was working for the Respondent, I confirm that there were Occurrence Books kept and maintained by the Respondent in which all occurrences including taking over and handing over were noted. Besides, there were Cloaking in systems kept by the Respondent..." "... THAT all the Occurrence Books as well as the Cloaking System was the property of the Respondent. I am therefore unable to tender the same to this honorable Court considering I left all of that in the Respondent's custody as I left employment..."

21. The Claimants also filed in court both day and night shift Security Duty Rooster for the months of January 2021 and July 2021. [See pages 143-147 of the Claimants Bundle]. To make the illustration even more lively; they filed and adopted extracts from the Occurrence Book noting to highlight necessary entries. [See pages 148 -182 the Claimants Bundle]. The highlighted manually entered occurrences in the extracts of the Occurrence book pointed towards the times of hand over which could equally point towards the time when the claimants reported to their respective work stations as security



Guards. No entry has been made of any absentee. It should be noted that all these materials belonged to Proto Energy Limited's (the Respondent herein) Occurrence Books in respect of the Claimants daily entry/reporting and exit from the company on the material times of this suit; the printout of the Respondents Job Attendance Log in cloaking system indicating reporting and exit of the Guards as well as the day and night Duty Roosters were in the possession of the Respondent. Vide a Notice to Produce issued under Section 69 of the Evidence Act; the Claimants sought for these critical materials which were in the Respondents Company's custody. [The same is dated 23rd August 2024 and was received on 6th September 2024. See Item No. 61 on the Claimants List of Documents found at page 183 of the Claimants Bundle of Documents] Instead of availing information sought by the Claimants vide their Notice to produce which information could have exonerated the Respondent in the event its version and account was the truth; Instead the Respondent filed in Court a Notice of Non-Admission dated 31st October 2024 and filed in court on 6th November 2024. 26. Under Section 69 of the Evidence Act; a party who issues a Notice to Produce to the other such as the Claimants here is at liberty to rely on the secondary evidence he may have provided such as the day and night shift Security Duty Rooster for the months of January 2021 and July 2021. [See pages 143-147 of the Claimants Bundle] and the Occurrence Book. [See pages 148 -182 the Claimants Bundle] 27. These two secondary documents should be read and considered side by side with the witness statements of the claimants as well as that of the Overall Security heads Witness Statement of Major (Rtd) Samuel Ole Tolu dated 13th December 2023 being Item No. 54 in the Claimants Bundle of Document and found at pages 140 - 142 of the Claimants Bundle] It is our further submission which we invite this honorable court to find favour with that logically and as a per the evidence of Major (Rtd) Samuel Ole Tolu It is a statutory duty for the Respondent herein to keep in its custody the documents sought in the Notice to Produce Confronted with a similar circumstance; in *West Kenya Sugar Co. Ltd v Patrick Mwakha Shihundu* [2019] KEHC 5866 (KLR); Justice J Njagi held at paragraph 25 thus: "The respondent's advocate had served the appellant with a notice to produce, inter alia, the muster roll, accident register and payment sheets for the month of February, 2014. The appellant declined to produce the documents. It is a statutory duty for the appellant to keep such documents. The failure to serve the advocates for the respondent or even to produce the documents in court led to the presumption that, had the documents been produced they would have been adverse to the appellant's case." [Emphasis] Similarly; the Court of Appeal in *H. Young & Company (E.A) Limited v Okoth & another* (Civil Appeal 51 of 2020) [2025] KECA 466 (KLR) (7 March 2025) at paragraph 16 held thus Besides mere denials that the respondents did not work beyond the normal working hours, the appellant did not lead any evidence to disprove the respondents' claim for overtime payment. It is our considered view that information on payment of allowances such as overtime is ordinarily expected to be in the custody of the employer who maintains the employment records. By dint of Section 112 of the Evidence Act, in civil proceedings, if any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon the said party.

22. Moreover; under statute i.e. Sections 10 and 74 of the Employment Act, Laws of Kenya, employers are required to keep written contracts and maintain records of employees' particulars, wages and payment details, working hours, leave entitlements and social security contributions. The Respondent's failure to produce what is statutorily in its possessions, violates statutory obligation and shifts in the burden of proof to the employer under section 10 (7) of the Evidence Act. Another important concession by the Respondent is at paragraph 16 (g) of the Amended Statement of Response in which it is averred: "The Claimants alternated between day shift and night shift which is subject to different working hours. The Maximum working hours for night shift is 60 hours spread over 6 days a week, which translates 10 hours per shift on average. The averment that the Claimants worked overtime on night shift is denied" It is clear from the Claimants evidence that all shifts took 12 hours i.e. both day and night shift. In the Respondents averment quoted above; a clarification is offered by the Respondent that the Guards were



requiring to work for 10 hours when on night shift. My lady, while it is true that Regulation 5 of the Regulation of Wages (General) Order, 1982 contemplates an employer to require employees working on night shift to work up to 10 hours in a day; nothing prevented the Respondent from stipulating that in the contract of employment entered into by the claimants whose shifts fell at night. A reading of Regulation 5 of the Regulation of Wages Order provides -") Notwithstanding subparagraph (1) the normal working week of a person employed on night work shall consist of not more than sixty hours of work per week [Emphasis]. 34. The provision quoted in the paragraph hereinabove means that the maximum hours the claimants on night shift were to work for was 10 hours in each of the 6 days worked. Evidence led by the Claimants is that they worked for 12 hours contrary to the 8 hours in their contracts of employment as well as the 10 hours stipulated under Regulation 5 (2). The Respondents averment quoted at paragraph 32 hereinabove is simplistic as it is a mere invocation of the provision of Rule 5 (2) Regulation of Wages Order in an attempt to speak to what evidence and facts otherwise address. The only way of determining the number of hours worked is by tendering of the Occurrence Books in respect of each of the Claimants daily entry/reporting and exit from the Respondents premises as well as printouts of attendance login in the Respondents cloaking system well within its custody and care. The mischief of resisting production of this essential material which could have otherwise exonerated it is clearly catching up with the Respondent now. On the flipside; the Claimants labored with hardship in his quest to have this court to admit the little secondary material at their disposal to support their case. Averments by the Respondent that the claimants were alternating in shifts is not true and the same is not supported by an iota of evidence. Nothing could have been easier for the Respondent than to produce the documents which the Claimants sought and if that was to be the case; then the Respondent could have been vindicated. The secondary evidence which the claimant invited the court to consider and base reliance on i.e. Security shift duty rosters running from page 143 all through to 147 and 183 and 184 of the Claimants bundles paints the clear picture of two distinct shifts i.e. Green Shift (Day Shift) and Blue Shift (night Shift). From the un rebutted evidence in the Security Shift Duty Rosters; the Claimants fell into respective shifts as set out below: Green Shift (Day Shift) a) Samson Muli Masengo - 2nd Claimant [See page 143 & 145 of the Claimants Bundle of Documents]; b) Jimmy Mulongo Wanyama - 3rd Claimant [See page 143 & 145 of the Claimants Bundle of Documents]; c) Guyo Tadicha Godana - 5th Claimant [See page 145 of the Claimants Bundle of Documents]; d) Felistas Kaveni Kyalo - 6th Claimant [See page 143 & 145 of the Claimants Bundle of Documents] Enoch Aguta Onsando - 8th Claimant [See page 143 & 145 of the Claimants Bundle of Documents]; f) Simon Kong'ina Nawiy - 10th Claimant [See page 143 & 145 of the Claimants Bundle of Documents]; and g) Ouru Moreka Wycliff - 11th Claimant [See page 143 & 145 of the Claimants Bundle of Documents] Blue Shift (Night Shift) a) John Kyalo Philip - 1st Claimant [See page 144 & 146 of the Claimants Bundle of Documents]; b) Michael Gathingi Mwangi - 4th Claimant [See page 144 & 146 of the Claimants Bundle of Documents]; c) Nelson Ndereva Njue - 7th Claimant [See page 146 of the Claimants Bundle of Documents]; d) Martin Mwenda Kirithi - 9th Claimant [See page 146 of the Claimants Bundle of Documents]; 40. Your Ladyship; *the Constitution* of Kenya 2010 protects the avails to the claimants the right to equal protection and equal benefit of the law as every person is deemed equal before the law. Further, Article 28 bestows upon the claimants herein inherent dignity and the right to have that dignity respected and protected. Slavery and servitude are also outlawed by *the Constitution* at Article 30. It's equally instructive for the courts attention to be focused on the provisions of Article 41 on labour relations rights which avail to every person has the right to fair labour practices to wit to be fairly remunerated and employed in reasonable working conditions

23. Over and above constitutional safeguard; the *employment Act* at Section 27 requires an employer to set up working hours for its employees by providing thus: "...An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law..."



"... (2)Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days..." our Ladyship; Section 26 (2) of the *Employment Act* provides thus: "Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Employment and Labour Relations Court are more favorable to an employee than the terms provided in this Part and Part VI. then such favorable terms and conditions of service shall apply." From the Claimants' contracts of employment; it was mutually agreed that they were to work for a total of 52 hours a week which hours could be spread all over the week. It is the Claimants' submission that the contractually agreed hours of work best deem them in line with Section 26 (2) of the *Employment Act*. As such; it's their contention that any hour worked outside the stipulated timeline be it during the day shift or at night constituted overtime for which they were entitled to be paid. The Regulation of Wages (General) Order, 1982 stipulates hours of work at Regulation 5 which provides thus: (1) The normal working week shall consist of not more than fifty-two hours of work spread over six days of the week. [Emphasis] (2) Notwithstanding subparagraph (1) the normal working week of a person employed on night work shall consist of not more than sixty hours of work per week. (3) No person under the age of sixteen years shall be required to work for more than six hours in any day. Regulation 6 of the Order on overtime pay stipulates: (a) "Overtime shall be payable at the following rates-(a)for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate; (b) for time worked on the employees' normal rest day or public holiday at twice the normal hourly rate." It is on account of the foregoing formular at Regulation 6 (a)that we have premised the calculations found in the Claimants' Amended Statement of Claim under Particulars of the Claimants' overtime dues. It is bizarre how the Respondent has grappled to tender grounds justifying averments that the Claimants are not entitled to overtime pay. At first; the Respondent made mere denials, followed by averments that the claimants never worked for extra hours. Subsequently; it introduced a response couched in the terms of Regulation 5 (2) of the Regulation of Wages (General) Order, 1982 and ultimately softened its stance and conceded that they indeed worked overtime but all of the overtime pay entitlement was settled as in the pay slips it introduced late in the day in its further bundle of documents. Finally, it indicated that the claimants were to sign overtime claim form as stipulated in the Human Resource Policy. Addressing the issue of pay slips introduced by the Respondent; it is true that some overtime payments were done to the Claimants on a few occasions. A cursory look at the pay slips discloses a consistent multiplier of *2 which means that these were overtime payments on work done either on rest days or for work done during public holidays. The Claimants were conscious that overtime for these two categories was paid to them which is why they never sought for the same in their claim. In the contrary; their claim is only on overtime for extra hours worked on a daily basis during ordinary days whose multiplier is *1.5.

24. That the assertion that the Claimants are not entitled to overtime merely because they dint sign the forms stipulated under its human resource manual and policy is misplaced and misleading. It's the claimant's evidence that they never signed any of the form to claim overtime. They were however paid overtime for public holidays and work done during rest days as indicated in the pay slips introduced in court by the Respondent at the multiplier of *2 during the course of their employment as stipulated without being required to fill any form. What then changes when it comes to overtime under the multiplier of *1.5 for work done on extra hours on ordinary days? The claimant's employment was terminated vide a letter dated 14th July 2021. While the letter indicated that the last working date for the claimants was to be on 13th August 2021; the Respondent opted to have the same take effect immediately (14th July 2021) an in lieu; it paid all of them one month salary in lieu of Notice. Nothing barred the Claimants from seeking payment of their overtime dues at any point during the pendency of their employment. It could have even been done on their last day at work. Considering the immediate effect of the termination letter; they were clearly prejudiced as they could not make their requests and



have the same processed. . In the instant suit; which was filed within the stipulated timelines as provided for under Section 89 of the [Employment Act](#) which provides thus: 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.

25. It is our submissions therefore that it is well within the claimants' rights to seek to be paid their overtime dues. On the face of Section 26 of the [Employment Act](#); it could be improper to rely on failure by the Respondent to avail claim forms to the Claimants to enable them claim to their detriment.

Respondent's submissions

26. The Claimants are not entitled to overtime dues at all. The 1st, 2nd, 3rd, 4th, 6th, 8th , and 11th Claimants were employed as security officers by the Respondent. The 5th, 7th and 9th Claimants were employed as Motorbike Security Riders. The 10th Claimant was a security supervisor whose role entailed supervision of the security staff including all the other claimants named herein. The Claimants alleged that they worked for a total of 12 hours per day for 6 days every week. The Claimants allege that this was above the contractual hours of work which they allege were 8 hours per day. The Respondent denied this and in rebuttal produced the copies of respective contracts of employment which provided that the minimum hours of work per week for the Claimants were 52 hours per week. Some of the contracts provided for 72 hours of work per week for the security staff, for instance the contracts of the 3rd, 5th, 7th, and 10th Claimants. (Refer to the contracts of employment at pages 1 to 43 of the Respondent's supplementary bundle of documents dated 19th November 2024.) The Claimants have placed reliance on the witness statement of Retired Major Ole Tundo for the averment that they worked in day shifts and night shifts of 12 hours each. They have also produced excerpts of the manually filled occurrence books (Pages 232 to 267 of the Claimants' bundle of documents dated 17th December 2021) and the document labelled as a duty rota. The Claimants relied on the notice to produce documents dated 23rd August 2024 through which they notified the Respondents to produce the occurrence books, clock in details and duty rota for the Claimants and other security guards from September 2018 to July 2021. The Respondent replied by filing a notice of non-admission of documents dated 31st October 2024 through which it declined to produce the documents on the grounds inter alia that the notice is not anchored under the [Employment and Labour Relations Court Act](#) or the Employment and Labour Relations Court (Procedure) Rules, 2024. The Claimant further submitted that the failure to produce those documents shifted the burden of proof to the employer and creates a presumption that had the documents been produced they would have been adverse to the Respondent's case. In response thereto we rely on the case of case of Patrick Lumumba Kimuyu Vs Prime Fuels(K) Limited [2018] eKLR where the Court held that: "Whereas we appreciate that the [employment Act](#) enjoins an employer to keep employment records in respect of an employee, that does not absolve an employee from discharging the burden of proving his/her claim. If anything, that burden weighed more heavily upon the appellant in view of the respondent's categorical denial that the appellant had worked on the days claimed. It behooved the appellant to first discharge the burden by showing that he had indeed worked on the public holidays and Sundays as contended. Only upon such proof, would the evidential burden then shift to the respondent to show that she paid for the overtime worked." See also the case of Rogoli Ole Manadiegi v General Cargo Services Limited [2016] KEELRC 1607 (KLR) where the court held that "The Employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the Employer bringing to Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the Employee." The Claimant also referred to section 10 (7) of the [Employment Act](#) for the argument that the burden of proving the hours worked rested on the Respondent. In response thereto,



we submit that Section 10 (7) of the [Employment Act](#) only obligates the employer and places the burden on the employer to prove the existence of a contract of employment or the particulars thereof. This does not replace the primary rule of evidence that he who alleges must prove and this burden only shifts after such proof. The burden rests with the Claimants to prove that they worked over and above the agreed working hours, during holidays and that they were not paid for the overtime. We now turn to the secondary evidence produced by the Claimant comprising of the occurrence book and duty rotas for security staff. The extracts of occurrence books at pages 234 to 267 of the Claimant's bundle of documents do not contain the company letterhead, logo or seal to show that they emanate from or relate to the Respondent. The documents consist of photographs of what is said to be an occurrence book but the Claimants have not produced a certificate of electronic evidence to confirm authenticity of the said photographs, when they were taken, by whom, from where and on which device. In the absence of such certificate the documents are inadmissible and ought to be expunged from the record. Without prejudice to the above, the photographs contain highlighted sections which the Claimants purport to be records of the hand-over records for security staff from day shift to night shift. However, none of the Claimants herein is mentioned in the handover notes. The claim for overtime is in the nature of special damages which should be specifically pleaded and strictly proved. As such the Claimant has not discharged the burden of proof of the overtime hours worked and in the absence of such proof the burden cannot shift to the Respondent to prove that overtime was paid. ii. The Claimants received a shift allowance for any work performed outside normal hours 13. Shift allowance is not expressly provided for in the [Employment Act](#) or the wages order. Shift allowance is defined as an additional payment, beyond regular wages, provided to employees for working "unsociable hours" such as nights, weekends, or holidays, as compensation for the inconvenience or disruption of working outside of standard working hours. (See <https://uk.indeed.com/career-advice/career-development/what-isshift-allowance>) The Claimants' contracts of employment provided that shift allowance was meant to "cater for monthly expenses incurred on any extra hours worked" (Refer to the addendum to the contract of employment for Samson Muli the 2nd Claimant herein at page 9 of the Respondent's supplementary bundle of documents dated 19th November 2024).

27. The Claimants' contracts of employment provided that due to the nature of their work as security work they may be required to work outside the normal working hours and the consideration for this was shift allowance payable every month regardless of the excess hours worked during the month. (Refer to the contract of employment at pages 21, 29, 34 of the Respondent's supplementary bundle of documents dated 19th November 2024). In this regard, the Respondent has produced copies of pay slips showing the breakdown of the Claimants' basic salary and allowances for the years 2020 and 2021. The Claimants cannot therefore say that they were not compensated. The Claimants did not comply with contractual and policy requirements on overtime. The Claimants' contracts of employment provided that the Claimants may be expected to work reasonable hours outside standard working hours. (Refer to clause 5 of the contracts of employment at pages 21, 24, 27, 29, 32, 34, 37 and 41 of the Respondent's supplementary bundle of documents dated 19th November 2024) The contracts further provided at clause 7 thereof that overtime compensation in the event of exceeding the normal working hours would be subject to approval by management. 16. The Respondent has annexed an excerpt of the Human Resources Policies and Procedures Manual at page 44 of the Respondent's supplementary bundle of documents dated 19th November 2024. Clause 5.4 of the manual provides for the overtime request procedure as follows: a. A formal communication is initiated via email from the respective HOD to the Manager in charge justifying the need and notifying of his intention, time (number of employees involved in the task and time requested) per Overtime Request form before the Overtime is done. b. Upon receipt of approval, the Manager then raises the Overtime Request Form. c. In circumstances where the approval is rejected, the particular task shall not take place. d. The physical form duly filled is then handed over to the HR department for verification and confirmation with



the time and attendance report. e. Upon confirmation the HR department will communicate to the payroll accountant for payment through the system. f. Employees entitled to overtime shall complete their assignment on time to avoid unnecessary cost. The overtime request procedure in the workplace is meant to cushion against abuse of the overtime provision so that an employer only compensates for reasonable and justifiable claims for overtime. In this regard the above clause provides for several approval processes. This approval is referred to in the respective contracts. More importantly, the process begins with a formal communication by the line manager and filling of an overtime form by the employee. The Claimants have not produced any overtime request form for the duration they claim to have worked overtime. The 10th Claimant was the security supervisor and was in charge of validating the overtime request forms submitted by his supervisees as required under clause 5.4 (a) and (b) above. The 10th Claimant has not produced any overtime claim forms submitted to him for approval relating to the days which the Claimants allege to have worked overtime. The Claimants ought to have discharged the burden of proof first that they worked extra hours, that they filled the overtime request forms for the hours worked and that the forms were submitted to management. With that, the burden would then have shifted to the Respondent to prove that overtime was paid. The pay slips produced in the further list of documents dated 19th June 2025 show that the Claimants were paid overtime every month for the days that had been properly communicated and approved by management. The Claimants submitted at paragraphs 51 and 52 of their submissions that their contracts were terminated with immediate effect and they could not make their requests for overtime or have them processed. This is misleading. The claim for overtime pay is computed from the date of commencement of employment for each Claimant. Some of the Claimants were first employed in 2019 such as the 3rd Claimant whose date of employment was 4th March 2019. This means that if at all the Claimants worked overtime as alleged they had the chance to claim the overtime dues in accordance with the company policy on a continuous basis. The Claimants' contracts were terminated with immediate effect and the Respondent paid one month's salary to each of the Claimants in lieu of notice. This did not however bar the Claimants from submitting any pending claims for overtime after termination. The Respondent's doors remained open at all times to receive such claims and if submitted and verified, the same would have been paid together with the terminal dues. iii. The 10th Claimant is not entitled to overtime as he was a manager. As stated above, the 10th Claimant was a security supervisor in charge of supervision of security staff. This was a management position in the company structure. Courts have held that overtime pay, which is provided in the wages orders are reserved for lower cadre employees earning minimum wage. In the case of *Albert Ouma Akeyo v Maguna Andu Self Selection Stores Ltd* [2013] eKLR the court held that: "The practice in the employment industry is that management staff are not normally entitled to overtime. The logic behind this is that they are part of the management and can be called to duty outside their regular hours and this is already catered for in the reasonably good salaries and allowances they are given. It is in this context that the court regards the management allowance that was being paid to the claimant and comes to the conclusion that he is not entitled to claim overtime as from the time he got promoted. Regarding the period prior to 2009, the claim for overtime would only be sustainable up to the year 2006 as any claim before this year would be statute barred by the reason of limitation period for bringing claims based on contract. There is a further problem that even if the court were to be prepared to award overtime for the period before 2009, such an award cannot be ascertained since the claimant has not disclosed the number of hours worked overtime and the salary he was earning prior to 2009 to enable the court use as a basis for calculating the overtime. The salary the claimant was offered on promotion in 2009 cannot be used as a basis for calculating overtime as this would give undue advantage to the claimant. To this extent this claim fails for lack of evidence." The Claimant was a management level employee earning a hefty salary of Kshs. 80,000. This is above minimum wage. The salary already catered for any hours worked in excess of the working hours. This was covered in the contract and the policy. Clause 7 of the



he 10th Claimant's contract of employment provided that "Based on the work schedule exigencies, you may be required to work extra hours above the normally required hours without further monetary considerations" (Refer to the contract of employment at page 38 of the Respondent's supplementary list and bundle of documents dated 19th November 2024).

28. We further rely on the case of *Kirimi v Onmobile Kenya Telecom Limited* (Employment and Labour Relations Cause 498 of 2019) [2023] KEELRC 906 (KLR) (20 April 2023) (Judgment) where the court held that a branch manager could not claim overtime pay by virtue of being a management levee employee: Overtime: This is pleaded at a staggering sum of Kshs 10,127,433. The Claimant did not in his Pleadings and Evidence give a breakdown of the hours worked, and show the formula adopted, to come with an overtime claim of Kshs 10,127,433. The Claimant was in Management. He was not an Employee whose terms and conditions of employment, resulted from a Wage Order, designed through the involvement of a Wage Council. A Wage Order seeks to protect the remuneration and other conditions of employment, of any category of Employees, in any sector, which is not adequately regulated by collective agreements; and where it is expedient to set minimum wages and other conditions of employment, in respect of Employees in those sectors. Wage Orders are aimed at protection of vulnerable blue collar Employees, who do not have adequate bargaining strength, in negotiating and concluding contracts of employment with their Employers. It is a protection mechanism, particularly to lower cadre of Employees, who not only lack the bargaining strength individually, but also do not have the advantage of collective representation of a trade union and collective agreements. Part VI of the *Labour Institutions Act* is clear that Wage Orders set down the minimum wage payable, or the wage floor, below which an Employer is not supposed to remunerate his or her Employee. They are aimed at setting the minimum standards of employment, and are not to be invoked by Managers, white collar Employees, who are deemed to have adequate bargaining strength, in entering into employment contracts with their Employers. The Claimant invokes the Regulation of Wages [General] Order, in pursuing overtime pay. He was however a Senior Business Manager and Account Manager, with adequate and equal bargaining strength, to engage his Employer. He did so, and freely executed a contract of employment on record, without the aid of a Wage Council. Clause 6 of his contract states: - 'You will be expected to work no less than 48 hours a week. Your working hours will be the working hours of the office from which you operate. There may be occasions when you may have to work beyond office hours due to exigencies the Company's business and you will not be entitled to any additional compensation on that account.' The Claimant's contract was express that the Claimant could be called upon to work excess hours, without additional compensation for the excess hours. His monthly salary at Kshs 265, 973, would be deemed to have factored in, that the Claimant would from time to time, be required to work excess hours. There would be no justification for overtime pay, outside the monthly salary. The Claimant cannot therefore submit that he merited overtime pay. His contract was clear on this. The prayer for overtime pay at Kshs 10, 127, 433 is rejected." We further rely on the case of *Patricia Wangui v Standard Chartered Bank* [2019] eKLR where it was held that "Likewise, the prayer for overtime pay is dismissed because the claimant admitted that she held a management position and that she was never a member of the trade union which had negotiated that benefit to her members." In view of the foregoing, we urge this honourable court to dismiss the 10th Claimant's claim for overtime pay on the basis that it was not provided under the contract and internal policies and that the Claimant, being a manager is not entitled to overtime pay which under the Regulation of Wages (general) order and the Protective Security Services Order is reserved for lower cadre employees earning minimum wage.

Decision

29. In the matter of *Rogoli Ole Manadiegi -vs- General Cargo Services Ltd* (2016) eKLR Justice Rika stated in paragraph 7- "The employee in claiming overtime pay however is not deemed to establish the claim



for overtime pay by default of the employer bringing to the Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The Claimant did not show in the trial Court when he put the excess hours, when he served on Public Holidays or even rest days. The evidence on record does not even separate normal overtime from time on rest days and Public holidays. The rates of compensation are different. He did not justify the global figure earned in overtime showing specifically how it was arrived at based on the Regulation of Wages (Protective Security Services) Order 1998 but gave no consistent evidence showing the hours worked and how these hours gave rise to the figure of KShs. 222,350/= claimed as the overall overtime.” The Court of Appeal in the case of Ngunda v Ready Consultancy Limited (Civil Appeal 129 of 2019) [2022] KECA 577 (KLR) (4 February 2022) held that:- "On the issue of payment for 33 public holidays, 152 Sundays, and 5184 hours of overtime, the learned judge was not satisfied that a firm basis was established, and dismissed the claim. An analysis of the record does not disclose that these claims were properly established. No evidentiary proof was provided that the appellant worked on those days. There were no details or particulars given of the public holidays or Sundays worked. Did he work on all public holidays and Sundays, or just some of them? Which days in particular? As regards the alleged overtime, there was no breakdown of the 5184 hours into the days to which they related. As it were, it would seem that the appellant was engaged in overtime work continuously for the entire 5184 hours, which is neither feasible nor humanly possible. As correctly submitted by the respondent, he who alleges must prove. Since the appellant did not provide any proof that he worked on public holidays or the Sundays, or indeed overtime, contrary to his assertions, the burden not shift to the respondent to provide further evidence in this regard. As rightly observed by the learned judge, the appellant did not clock overtime, and there was no record to show that he attended the workplace on public holidays or on Sundays." The foregoing decisions are to effect that in a claim of overtime, the employee must properly establish the claims. In the instant case the claimants produced extract of day and night shift security duty roster of January 2021 to July 2021(pages 148 -182 of the claimant’s bundle.) The claimant further filed and served notice to produce dated 23rd August 2024 under section 69 of the Evidence Act seeking for occurrence books for entry/reporting and exit for period 1st September 2018 – 14th July 2021, printout of the clocking system and day and night duty rooster for the said period. In response, the respondent filed notice of non-admission of documents. Consequently relying on section 69 of the Evidence Act the claimant stated for lack of response they were entitled to rely on the secondary data.

30. The respondent raised a defence of having paid the claimants' monthly shift allowance of Kshs. 10000 to cater for extra hour worked and produced letter to that effect addressed to the claimants and signed on 21st May 2019. The letter indicated the normal working hours were 52 hours per week spread over 6 hours per week (see page 9 of the respondent’s bundle). The respondent further relied on its human resources manual clause 5.4, which provided for the procedure of claiming overtime, and submitted that during employment, no such claim was made. The manual provided for overtime request form. (page 44 of the Respondent’s bundle). The respondent produced payslips of the claimants under supplementary list of documents dated 17th June 2025. The payslips indicated overtime pay. The claimants stated that the multiplier of 2 meant the overtime was in relation to days worked on Sundays and public holidays and their claim was in respect to normal working days thus use of multiplier of 1.5 . The court confirmed the claim was for 12 hours for 6 days a week. The respondent produced undisputed letter to the employees which indicated shift allowance would be paid to cater for extra hours outside the 52 hours per week and the payslips indicated shift allowance was paid plus overtime with multiplier of 2.
31. Section 5 (1) of the Regulation of Wages (General) Order, 1982 provides for normal working hours as –‘The normal working week shall consist of not more than fifty-two hours of work spread over



six days of the week.” In section 6(1) payable overtime is provided for as follows- ‘Overtime shall be payable at the following rates—(a)for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate;(b)for time worked on the employees normal rest day or public holiday at twice the normal hourly rate.’ The respondent did not comply with the notice to produce and hence the documents produced by the claimants were admitted as evidence of the claimants having worked overtime. The court found evidence of compensation for overtime to the claimants demonstrated in their payslips of overtime with multipliers of 2 meaning for rest days and public holidays and the shift allowance paid as per the letter produced by the respondent, to effect the working hours were 52 and the shift allowance was for extra hours worked. The respondent produced its human resource manual and relied on clause 5.4 which provided for overtime request form. The claimants did not produce evidence of having made a request for payment of extra overtime beyond what was paid as overtime and shift allowance pursuant to the human resource manual. The 10th claimant was employed as a security supervisor. On perusal of his witness statements dated 23rd August 2024, the court did not find any averment of having processed a claim for overtime for the other employees which was not paid.

32. The court on evaluation of the documents placed before it by the parties concluded that whereas there was prove of the claimants having worked overtime, there was undisputed evidence that the claimants save for the 10th claimant who was a supervisor and paid beyond minimum wages were paid lawful wages including overtime. The court established that all other claimants were compensated for overtime work vide the shift allowance and the overtime paid for rest days and public holidays. The claim for outstanding payment of overtime was not proved on a balance of probabilities and is dismissed.
33. On costs- the default principle of litigation is that costs follow the event. The respondent conceded the claim and agreed to pay compensation equivalent to 2 months' salary for unfair termination. The court upheld the decision relied on by the claimants to wit- Further, In Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page at page 101, the author authoritatively states as follows on the issue of costs: - "The law of costs as it is understood by Courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the Court to deprive him of his costs the Court has no discretion and cannot take away the plaintiff's right of costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course". The respondent ought thus to bear the costs for the claim for the unfair termination which it conceded. The respondent is ordered to pay the claimants costs of the suit.

Conclusion

34. The claim for overtime is held to be without merit and is dismissed. The respondent agreed to pay the claimants' costs of the claim, having settled to pay 2 months' salary for the unfair termination.
35. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF JANUARY, 2026.

**J.W. KELI,
JUDGE.**

In The Presence Of:



Court Assistant: Otieno

Claimant: Omayio and Juma

Respondent: Ms Wanyongu

