

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT MACHAKOS

APPEAL NUMBER E013 OF 2024

CHARLES KYALO MULI.....1<sup>ST</sup> APPELLANT

PAUL MULWA KILAMBYA.....2<sup>ND</sup> APPELLANT

-VERSUS-

KARSAN RAMJI & SONS LIMITED T/A NDOVU CEMENT.....RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. Kuto (SPM) delivered on  
31<sup>st</sup> July 2024 in Mavoko CMEL No. E053 of 2022)*

CORAM

*Before Lady Justice J. W. Keli*

*C/A Otieno*

JUDGMENT

1. The Appellants herein, being dissatisfied with the Judgment and Decree of the Hon. Kuto (SPM) delivered on 31st July 2024 in Mavoko CMEL No. E053 of 2022 between the parties filed a Memorandum of Appeal dated the 15<sup>th</sup> August 2024 seeking the following orders: -
  - a) The judgment be set aside, reviewed, varied and judgment entered for the Appellants for overtime claim as pleaded and proved in the claim.

## **GROUND OF THE APPEAL**

2. The Honourable Magistrate erred in law and fact by failing to render judgment on the issue of overtime pay compensation which was a distinct and separate claim prayed by the Appellants.
3. The judgment of the trial court did not deal with all issues raised and is silent on the issue of overtime pay claim compensation.

## **BACKGROUND TO THE APPEAL**

4. The Claimants/Appellants filed a claim against the Respondent vide a statement of claim dated the 23<sup>rd</sup> of September 2022 seeking the following orders: -
  - a) A declaratory order that the Respondent's termination of the Claimants' contracts of service was unprocedural, illegal and unfair.
  - b) Special and general damages as pleaded at paragraph 9 of the claim.
  - c) Costs of the suit.(pages 4-6 of Appellants' undated ROA)

5. The Claimants filed the witness statements of the Claimants/Appellants dated 23<sup>rd</sup> September 2022; and list of documents of even date with the bundle of documents attached (pages 8-45 of ROA).

6. The Respondent entered appearance and filed a response dated 23<sup>rd</sup> November 2022 (pages 46-49 of ROA). In support of their response, the Respondent also filed a list of witnesses dated 23<sup>rd</sup> May 2023; witness statements of PURITY KAIRO, BARBRAH AINOMUGISHA and DANIEL MURIUKI GITARI dated 23<sup>rd</sup> March 2023 and 24<sup>th</sup> March 2023 respectively; and bundle of documents dated 23<sup>rd</sup> May 2023 (pages 50-172 of ROA). The Respondent later filed a further list of documents dated 14<sup>th</sup> August 2023 (pages 173-184 of ROA).
7. The Claimants/Appellants case was heard on 4<sup>th</sup> October 2023, with the 1<sup>st</sup> Claimant/Appellant testifying on behalf of his co-claimant, and relying on his filed witness statement and producing their documents as exhibits. The 1<sup>st</sup> Claimant/Appellant was cross-examined by counsel for the Respondent, Mr. Munani (proceedings on pages 187-194 of ROA).
8. The Respondent's case was heard on 25<sup>th</sup> January 2024 and 7<sup>th</sup> March 2024, with PURITY KAIRU testifying on behalf of the Respondent as DW1; and BARBRAH AINOMUGISHA testifying as DW2. The witnesses relied on their filed witness statement, and produced the Respondent's documents as exhibits. The witnesses were cross-examined by counsel for the Claimants/Appellants, Mr. Nyende (proceedings on pages 194-203 of ROA).
9. Following the hearing, the trial court gave directions on filing submissions and the parties complied.

10. The Trial Magistrate Court delivered its judgment on the 3<sup>rd</sup> of July 2024 dismissing the Claimants' case in its entirety, with costs (judgment on pages 316-323 of ROA).

## **DETERMINATION**

The appeal was canvassed by way of written submissions. Parties complied.

### **Issues for determination**

11. The court on perusal of the grounds of appeal found there was only a single issue for determination in the appeal namely:-

(a) Whether the trial court erred in its determination on the overtime.

12. The grounds of appeal were:

1) The learned magistrate erred in law and fact by failing to render judgment on the issue of overtime pay compensation which was distinct and separate claim prayed by the Appellants.

2) The judgment of the trial court did not deal with all issues raised and is silent on the issue of overtime pay claim compensation.

13. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968]

EA 123 that:- *“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to*

*follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."*

14. Further in on principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

*"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."*

15. The court perused the judgment of the trial court, by Hon. D. Kuto (Senior Principal Magistrate) delivered on 31<sup>st</sup> July 2024 and found no findings on issue of overtime. The 2 Claimants pleaded that they worked for 4 and 7 years, respectively, for 12 hours per daily work shift, 6 days a week, without overtime.
16. The Claimants particularised the claim for overtime as 4 hours daily for 26 days a month at rate of 1.5 as per the regulations of wages orders. (page 5 of the R.O.A. were the relevant pleadings). The court agreed the trial court erred by failing to determine whether or not the claim for overtime was merited.

17. In support of their claim of overtime the Claimants produced their payslips, certificates of service, letter of employment, work shift, time log in schedule, employment identification documents and termination letters.
18. The 1<sup>st</sup> Appellant was employed on 10<sup>th</sup> June 2015 and exited on the 29<sup>th</sup> July 2022 (at page 13 of ROA is the certificate of service). The 2<sup>nd</sup> Respondent was employed on 30<sup>th</sup> October, 2018 and exited on 29<sup>th</sup> July 2022 (page 14 of ROA is the certificate of service).
19. The Appellants produced samples of their December 2021 payslips. The court noted that both payslips included an element of overtime (pages 15-16 of the ROA). The first Appellant's service contract regarding remuneration states in clause 2, "you will receive a Gross Salary of KShs.38,500.00 which is inclusive of house allowance, monthly O.T." O.T. is the an abbreviation for overtime. (page 17 of ROA). Clause 6 of the contract indicated that working hours are 52 hours and 60 hours per week for security staff, with one rest day after 6 consecutive days of work. The clause further stated: "Any hours above work will be paid as overtime whenever it is agreed upon and approved by line managers. Any public holiday worked with approval from line managers will be paid as overtime." (page 18 of ROA).
20. The Appellant further produced samples of nightshifts, but the dates were ineligible, indicating work of 12-hour shifts. (pages 22-28 of ROA).The Respondent denied the claim of overtime in paragraph 11(c) of the response to the statement of claim as follows: "The gross salary paid to the Claimants was inclusive of overtime, as provided under clause 2 of

the respective contracts of employment and the payslips produced. The Claimants are put to strict proof of any overtime worked that was not paid”. (page 48 of ROA).

21. In support of the response, the Respondent produced the employment contracts of the Appellants, certificates of service, final payslips and cheques. I found the contracts were similar to those produced by the Appellants and highlighted above.
22. During the hearing and at cross-examination, the 2<sup>nd</sup> Appellant told the court he was not paid overtime. The 2<sup>nd</sup> Appellant testified on behalf of the 1<sup>st</sup> Appellant.
23. The witness for the Respondent at cross-examination told the trial court that overtime was paid and relied on the payslips (pages 189 – 200 were the trial court’s proceedings). The burden of proof of extra hours worked, overtime, is on the employee. The pleadings and evidence before the trial court are to the effect that the employer recognized the legal hours of work and recorded them for payment of overtime for extra hours as per the contracts of employment produced by the Appellants. The Appellant produced in court their payslips which indicated overtime was paid. (page 15 to 16 of ROA). It was thus their burden to prove the payment of overtime was not sufficient. The court agreed with the Respondent that submissions are not pleadings, and rejected the attempt to explain the overtime claim in submissions.
24. The court on first appeal evaluated the pleadings, proceedings and documents before the trial court. The court, on evaluation of the evidence before the trial court, found that the

Respondents' claim for overtime was not proved on a balance of probabilities. The appeal is dismissed.

25. Regarding costs, the general rule is that costs follow the event. In this case, the court departs from this principle because it found the trial court erred in failing to decide on the claim for overtime. Upon re-evaluation of the evidence before the trial court, the court determined that the overtime claim was not proven on a balance of probabilities. Therefore, the court concludes that, in the interest of justice, each party should bear their own costs on appeal.

26. The appeal is dismissed. Each party to bear own costs in the appeal.

27. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13<sup>TH</sup> DAY  
OF MARCH, 2026.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Nyende

Respondent – Gitau h/b Murithi

