REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. E148 OF 2024

(Before D. K. N. Marete)

GRACE NAFULA……. APPELLANT

VERSUS

EVERFLORA LIMITED……..……...… RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Appeal dated 17th May, 2024. It comes out as thus;

i) The trial court erred both in law and fact in failing to consider both oral and documentary evidence adduced by the Appellant during trial.

ii) The trial court erred both in law and fact failing to find that the Appellant had proven her case to the required standard thus unfairly dismissing it.

iii) The trial court erred both in law and fact by unfairly dismissing an undefended suit.

iv) The trial court erred both in law and fact by failing to find that the Appellant was underpaid thus contract illegal.

v) The trial court erred both in law and fact by shifting the burden of proving the particulars of the employment contract to the Appellant thus contravening the provisions of Section 10(7) of the Employment Act.

vi) The trial court erred both in law and fact in failing to consider the Appellant's written submissions and list of persuasive authorities.

She prays thus;

a) This appeal be allowed and the judgement delivered by Hon. C. L Adisa on 17th April, 2024 be reviewed/set aside and judgment be entered in favour of the Appellant.

b) Costs of this appeal and the costs of the lower court be borne by the Respondent.

The Appellant in their written submissions dated 22nd January, 2025 raises the issue of the trial court's dismissal of the claim for overtime as one of the issues for determination. They submit that once a claim for overtime is made, the burden of proof shifts to the employer who is ordinarily the custodian of such records to disapprove the allegations as was enunciated in the authority of **Baruk vs Board of Management, St Georges High School (2024) KEELRC 1491 (KLR)**.

The Appellant's case is that she worked for an extra four (4) hours and the Respondent only paid her for two (2) hours. She sought overtime payment for the two (2) extra hours worked. It is not denied by the Respondent that the Appellant worked from 600 hours to 1800 hours for six (6) days a week all totaling to seventy-two (72) hours a week. The trial court found that in

accordance with the Employment Contract signed by the Appellant, she was required to work for sixty (60) hours and not the forty-eight (48) hours that she premised.

Regulation 6 of the Regulation of Wages (Protective Security Services) Order, 1998, the normal working hours of day and night guards is fifty-two (52) hours a week spread over 6 days of the week. It is therefore proper to state that the guard worked for eight (8) hours a day and not the ten (10) hours stated in the contract. By upholding that the Appellant was to work for sixty (60) hours/10 hours a day the trial court erred by allowing an illegality. Indeed, the Appellant worked for an extra four (4) hours a day but was only compensated for two (2) hours. This having not been denied by the Respondent, it becomes due for compensation in overtime by the Respondent. This totals to an amount of Ksh. 544,720.98 after deduction of what is already paid for.

The other issue for determination is a consideration for the issue of a letter confirming employment of the Appellant by the Respondent so as to facilitate pursuance of NSSF benefits for the Appellant. This is a simple but critical issue that this court must consider to enhance the employment welfare of the Appellant.

The Respondent in their written submissions dated 8th February, 2025 reiterates that the employment contract provided that the Appellant was supposed to work for six (6) hours a week and a total of sixty (60) hours. This amounted to ten (10) hours a day. In evidence, the Appellant claimed to have worked from 600 hours to 1800 hours, that is twelve (12) hours a day. This was two (2) hours overtime in a day. The Appellant produced payslips showing that she was paid overtime at page 16 of the Record of Appeal.

The Appellant, however, in her statement alleged that she worked for four (4) hours overtime every day. In such support she produced a document titled “OVERTIME SCHEDULE” at page 7 and 8 of the Record of Appeal indicating that she was owed Ksh. 544,720.98. She did not explain the source of the document and this does not from the Respondent or a labour officer and was drafted after she had resigned. This was manufactured evidence and the trial court rightly did not rely on it.

Overall, the court rightly considered the Appellant’s evidence and found that she had been compensated for overtime in accordance with the terms of employment. It also analysed the claimant’s case and issues for determination arising thereof and made a conclusive judgment on 17th April, 2024. There is therefore no basis for grounds 1, 2 and 6 of the appeal.

Again, the Appellant did not prove her case on a balance of probabilities as was established in the authority of **Mobipesa Ltd vs Amara (Civil Appeal 59 of 2022) (2024) KEHC 1529 (KLR) (16 February 2024) (Judgment).** Even though the claim was undefended, the Appellant was duty bound to prove her claim to the required standards in employment matters. This she did not and therefore ground 3 would not stand.

Looking at the respective cases of the parties, this appeal tilts in favour of the Appellant. She has demonstrated a case of working overtime for four (4) hours a day two (2) of which were compensated and paid for while the other two (2) were not. The Overtime Schedule and Overtime Workings at pages 7 and 8 of the Record of Appeal speak it all in such support and the Respondent’s case comes out as a mere denial of the same.

The trial court therefore erred in law and fact in not considering and dismissing the evidence of the Appellant and their case.

I am therefore inclined to allow the appeal, set aside the judgment of the trial court and order relief as follows;

(i) The Respondent be and is hereby ordered to meet and pay Ksh. 544,720.98 being compensation for overtime worked and not paid for to the Appellant.

(ii) The Respondent be and is hereby ordered to issue a letter of employment to the Appellant in fourteen (14) days.

Delivered, dated and signed this **17th** day of **April** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr. Chaungu holding brief for Ndichu instructed by M/S. P Kimani Ndichu & Associates Advocate for the Appellant
2. Mr. Mbuthia instructed by J. N. Mbuthia & Co. Advocates for the Respondent