

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. E 239 OF 2024

YELLOWLINE LOGISTICS LTD APPELLANT

VERSUS

ANTHONY MWANGI.....RESPONDENT

***[Being an appeal from the judgment of the Honourable Senior
Principal Magistrate, M.L NABIBYA, delivered on 17th October, 2024,
in MCELRC NO. E. 334 OF 2022].***

JUDGMENT

Background

1. By a Memorandum of Claim dated 20th May 2022, the Respondent herein sued the Appellant in the above-mentioned suit, contending that at all material times he was their employee, whose employment they terminated unfairly and unlawfully. On that basis, the Respondent sought against the Appellant a declaration

that the termination was unfair and unlawful, compensation for unfair termination, unpaid terminal dues, and compensation for unpaid overtime.

2. Upon being served with summons to enter appearance, the Appellant filed a Memorandum of Appearance dated 29th January 2023 and a Statement of Defence dated 27th March 2023. The Appellant denied the Respondent's cause of action and entitlement to the reliefs sought.
3. After hearing the parties on their respective cases and analyzing their evidence, the learned trial Magistrate rendered a judgment in favor of the Respondent. This judgment is the subject of the present appeal.

The Respondent's case before the lower

4. It was the Respondent's case that he was first employed by the Appellant in April 2014 as a long-distance driver at a monthly salary of KShs. 26,000. As of the time of separation, his salary was Kshs. 29,583.

5. The Appellant did not issue him with an employment contract as required by the provisions of Section 9[2] of the Employment Act, 2007.
6. On 31st October 2020, the Appellant served him with a notice of termination of employment dated 31st October 2020. The notice stated that the Appellant had decided to downsize its staff and, as such, his services were no longer required. The termination notice period was to run from 2nd November 2020.
7. He contended that the termination was not procedurally carried out as required by the law. It was not preceded by any consultations, and notification of the intended redundancy to the Labour Officer. The termination on account of redundancy was substantively unjustified as there was no redundancy situation at the Appellant's at the material time to warrant the laying off of staff on the grounds of redundancy. He was singled out for termination without any objective criteria.
8. He further asserted that the Appellant did not dutifully remit NSSF contributions on his account. At separation,

the Appellant failed to pay him the unremitted contributions.

9. Contrary to its statutory obligations, the Appellant did not provide him with accommodation nor pay him house allowance.
10. Throughout his employment, he was permitted to take annual leave on only two occasions. The Appellant never compensated him for leave days earned but not taken in the other years of service.
11. The Appellant repeatedly committed an unfair labour practice by making him work overtime without compensation. He worked seven days a week without rest. He worked on public holidays and for twenty-four hours.
12. The termination of his employment was procedurally and substantively unfair.
13. He asserted that in the circumstances of the matter, he was entitled to;
 - a) A declaration that the termination of his employment by the Appellant was unfair,

unprocedural, without any proper and valid cause, irregular, wrongful and illegal.

b) 12 months' gross salary as compensation for the unlawful/ unfair termination of employment, KShs. 354,996.00

c) Service Pay.....KShs. 147, 915

d) Unpaid overtime

[29,583/225x365x12x67/12yrsx1.5]

.....KShs. 4,823,015

e) House allowance

[15/100x29,583x79 monthsx6 years, 7 months].. KShs. 350,000

f) Costs of the suit

g) Interest

The Appellant's case before the lower court.

14. The Appellant stated that the Respondent worked for them as a long-distance driver under a contract of employment dated 2nd January 2015. The contract was terminated on 31st October 2020 due to redundancy.

15. The termination of the Respondent's employment was due to a financial downturn on its part, following losses in its business due to the port's relocation to Naivasha, as the transportation of containers was exclusively handled through the Standard Gauge Railway per the Presidential Executive Directive.
16. Owing to the situation, the Appellant had to close down some of its operations and lay off some of its employees due to redundancy.
17. One of those considered for the lay-off was the Respondent, given that he had numerous incidents of gross misconduct throughout his employment.
18. His terminal dues were duly calculated, but the Respondent refused to collect them.

The lower Court Judgment

19. After considering the parties' evidence and submissions, the learned trial Magistrate found that the termination of the Respondent's employment was

unfair. She, however, awarded him only compensation for overtime worked, KShs. 4,823,015.

The Appeal

20. Aggrieved by the Judgment, the Appellant impugns the judgment on the following grounds set out in his Memorandum of Appeal;

a) The Learned Magistrate erred in law and fact when she misdirected herself in awarding a sum of KShs. 4,823,015 as overtime that was manifestly excessive in the circumstances.

b) The Honourable Magistrate erred in law and fact in awarding the Respondent KShs. 4, 823,015 as overtime for 12 years by applying wrong principles.

c) The Hounorable Magistrate erred in law and fact in accepting the uncorroborated evidence of the

Respondent to arrive at the finding that the Respondent was entitled to overtime contrary to the Evidence Act and established rules of evidence despite failure on the part of the Respondent to prove his case.

d)The learned Magistrate erred in law and fact by holding that the Labour Officer was never informed of the redundancy.

21. The duty of this Court, as a first Appellate Court, is to re-evaluate the evidence placed before the trial Court and to reach its own independent conclusions. However, in doing so, it should bear in mind that it neither saw nor heard the witnesses testify, and give due allowance. See also. **Selle vs- Associated Motor Boat Company Ltd [1968] E.A 123.**

22. I have carefully considered the grounds of appeal, the lower court's judgment, and the respective submissions

by Counsel for the parties, and hold that the current appeal revolves around one issue, namely, whether the grant of the relief, overtime, was justified.

23. The Appellant submits that the award of the relief was untenable. The Respondent was duty-bound to demonstrate through pleadings and evidence the exact overtime worked and how he arrived at the sum claimed.

24. In rejoinder, the Respondent submits that Section 27 of the Employment Act mandates every employer to regulate the working hours of employees to ensure that they are entitled to at least one day of rest. Contrary to the statutory provisions, the Appellant worked seven days a week over extended long hours, day and night, exceeding the limit provided in statute. The Respondent worked public holidays without compensation.

25. Rule 5[2] of the Labour Institution Act, No. 12 of 2007, [subsidiary legislation] Regulation of Wages [General Order] indicates that the normal working week shall not

be more than fifty -two working hours over six days a week.

26. The Appellant cannot deny liability to pay for hours worked outside the statutory working hours simply because the contract of employment did not provide for overtime, as the Appellant tends to suggest in his submissions.

27. It is further submitted that despite the Appellant producing several documents in the lower court, it deliberately failed to produce any records relating to overtime. The burden of proof lay on it to demonstrate that the Respondent did not work overtime. Sections 10 and 74 of the Employment Act obliged it to do so. It did not. The learned trial Magistrate did not err in finding that the Respondent was entitled to overtime compensation.

28. This Court notes that that the Respondent pleaded regarding overtime, thus;

“13. The Claimant was subjected to unfair practice by being made to work overtime at

no pay. The Claimant used to work seven days a week without rest as his job entailed long-distance travel from Mombasa to Uganda. The Claimant used to work during the holiday and for twenty-four hours as such the Claimant avers that he was entitled for the period worked for the Respondent as a driver.”

29. The Respondent repeated this averment word-for-word in his witness statement cum evidence in chief.

30. Based on the Respondent’s pleadings and witness statement, it is evident that the claim for overtime includes both hours worked on public holidays as well as hours worked beyond the statutory daily working hours. However, one aspect remains entirely unclear: among the total amount claimed under the overtime category, how much is attributable to public holidays worked but not compensated? Additionally, which specific public holidays did the Respondent work on without receiving remuneration? What is the total

number of such holidays? Furthermore, from the total claim, what portion corresponds to hours worked outside the statutory daily working hours, and how much results from working without the entitled weekly rest days?

31. On numerous occasions, this Court has articulated that it is insufficient for an employee to merely assert that they have worked overtime, present a computation formula, and an associated sum, especially if such calculations do not correspond with the facts of their case. Merely relying on the absence of employment records from the employer to refute the employee's claims does not automatically render the claim successful.

32. The Respondent claimed that he worked continuously throughout his tenure with the Appellant, seven days a week, twenty-four hours a day. In my opinion, this assertion is implausible, and no reasonable tribunal or court could accept such a version.

33. This Court observes a prevalent practice among both litigants and their Counsel, reliance on the provisions of Section 74 of the Employment Act, with the assumption that the employer's failure to produce employment records in their defense shall automatically result in victory for their case. In my perspective, such an assumption is only valid where the Claimant has employed the mechanism of issuing a notice to produce, and the Respondent has failed to comply, thereby incurring the adverse consequences for default.
34. Having stated as I have hereinabove, I come to the inescapable conclusion that the Respondent did not before the lower court prove his case for overtime compensation. The learned trial Magistrate erred in allowing it, having viewed it from a narrow perspective. Consequently, the award is hereby set aside.
35. Having concluded as set out above, I find it unnecessary to consider the other issue[s] addressed in the parties' submissions.

36. In the upshot, the appeal succeeds. Each party shall bear its own costs.

Read Signed and Delivered this 30th Day of April 2026.

OCHARO KEBIRA

JUDGE

ORIGINAL