H. Young & Company (E.A) Limited v Okoth & another (Civil Appeal 51 of 2020) [2025] KECA 466 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 466 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 51 OF 2020

MSA MAKHANDIA, LK KIMARU & WK KORIR, JJA

MARCH 7, 2025

BETWEEN

H. YOUNG & COMPANY (E.A) LIMITED ..... APPELLANT

AND

WYCLIFFE OKOTH ..... 1ST RESPONDENT

PAUL NYAKACH ..... 2ND RESPONDENT

(An appeal arising from the judgment and decree of the Employment and Labour Relations Court at Kisumu (Nduma Nderi, J.) Dated 18th July, 2019 in ELRC Cause No. 304 of 2014)

JUDGMENT

1. The respondents sued the appellant before the Employment and Labour Relations Court at Kisumu, "ELRC" vide a statement of claim dated 2nd July, 2014. The suit was said to have been filed by the respondents on their behalf and on behalf of four other claimants. In the statement of claim, the respondents, who alleged that they were employed by the appellant in different capacities at the appellant's Olkaria IV Site, averred that the appellant had failed to pay them overtime allowances amounting to Kshs. 942,000.00, as per the Collective Bargaining Agreement "CBA" signed by the parties on 10th September, 2013. Their claim for overtime dues spanned across the months of May 2013 to July 2014.

2. The appellant, in response, filed a memorandum of reply on 29th January, 2015. The appellant admitted that the respondents were indeed its employees, and that their employment relationship was governed by the CBA dated 10th September, 2013. The appellant, however, pleaded that it had paid the respondents all dues owing to them, and further stated that the respondents were not entitled to any of the reliefs sought in their claim.

3. The case was heard by way of viva voce evidence. The 2nd respondent, Paul Nyakach, gave evidence on behalf of the respondents and on his own behalf. It was his evidence that they were entitled to overtime for all the days that they worked beyond the normal eight working hours, according to terms of their CBA. He testified that they communicated their concerns relating to lack of overtime payment to the company's management on several occasions, but that no action was taken. It was his evidence that the amount of Kshs.942,000.00 claimed was cumulative for all the respondents for overtime worked in the specified months between year 2013 and 2014, as set out in the computation sheet filed on 28th August, 2012. He availed the staff movement summary report which detailed the time each employee clocked in and out of work. He stated that the overtime pay was agreed at 1.5 times the normal rate of wages per hour, and double the normal rate of wages per hour on Sundays.

4. Eunice Waitere, the Human Resource Manager of the appellant company, gave evidence on behalf of the appellant. It was her testimony that the CBA signed by the parties governed the employee working hours, and that it also provided for overtime allowance. She stated that overtime allowances for each employee are included in the employees' pay slips and were duly settled when salaries were disbursed at the end of each month. It was her evidence that the respondents worked for eight (8) hours, between 8.00 a.m. and 5.00 p.m. She reiterated that the early clock ins and late clock outs could be attributed to the time when each employee was picked up in the morning and in the evening by the pool transportation, and not necessarily the hours they worked.

5. After hearing the parties, the learned Judge, held that the respondents had sufficiently established their claim for overtime pay for the period between 8th May 2013 and 12th July 2014. The learned Judge held that the respondents were only paid overtime for the month of May 2013, and were not paid for the rest of the period in dispute. The learned Judge awarded the respondents the cumulative sum of Kshs.942,000.00 as unpaid overtime.

6. The appellant was aggrieved by this decision, and has lodged an appeal before this Court, founded upon five grounds contained in its memorandum of appeal. In a nutshell, the appellant faulted the learned trial Judge for shifting the burden of proof to the appellant when, in its view, the respondents had not discharged the same. The appellant was aggrieved that the learned trial Judge awarded the respondents the entire sum that was pleaded, in the absence of any evidence to support the claim, and for finding that the appellant had not disputed the amount claimed. The appellant took issue with the fact that the learned trial Judge failed to consider its evidence during trial. The appellant was of the view that the decision by the trial court failed to uphold the law and render justice to the appellant. The appellant urged us to allow the appeal, and set aside the decision of the trial court, with costs to it.

7. The appeal was canvassed by way of written submissions which had been filed by both parties prior to the plenary hearing of the appeal. During the hearing, Ms. Awuor appeared for the appellant. It was her submission that the appellant offered transportation every morning and evening to and from the work site to the respondents, which fact was admitted by the respondents. She explained that the respondents were ferried by the same vehicle which picked them up at 5.00 a.m. and sometimes left very late in the evening. She urged the fact that respondents reported to the site before 8.00 a.m. and left after 5.00 p.m. did not automatically mean that they had worked overtime. She insisted that the respondents failed to prove that they started working immediately they arrived at the site, or that they continued working after 5.00 p.m., as they waited for transport back to their places of residence. Counsel submitted that the respondents did not avail any notices from the appellant communicating that they would be required to work overtime as was the practice.

8. With respect to the amount of overtime pay awarded to the respondents, it was submitted on behalf of the appellant that overtime work is a claim in form of special damages which must be specifically

pleaded and proved. Counsel urged that documentary evidence adduced by the respondents was irrelevant and did not prove or establish the amount claimed.

9. In response, learned counsel for the respondents, Ms. Mwangi, submitted that the respondents discharged their burden of proof with respect to the fact that they worked overtime without pay, and that the evidentiary burden shifted to the appellant to rebut this fact. Counsel urged that the CBA dictated that any hours worked beyond the stipulated eight hours in a day constituted overtime, which was to be compensated at the rate of 1.5 times the normal rate of wages per hour, and double the normal rate of wages per hour, if the overtime hours fell on a Sunday. Counsel reiterated that the respondents availed biometric data detailing the times they clocked in and out at the work site, and the hours they worked that constituted overtime.

10. This being a first appeal, the role and duty of the first appellate court was well settled in the case Gitobu Imanyara & 2 others v Attorney General [2016] eKLR where this Court stated that;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this 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 allowances in this respect."

11. Having evaluated the record of appeal, the submissions by parties to the appeal, and the applicable law, we have distilled the issues for our consideration as follows:

    i. Whether the respondents were entitled to overtime pay;

    ii. Whether the sum of Ksh.942,000.00 in overtime pay awarded by the learned Judge was proved to the required standard.

12. The appellant's appeal, in a nutshell, challenged the award of overtime pay, amounting to Kshs.942,000.00 by the trial court in favour of the respondents. We understood the appellant to say that the respondents failed to sufficiently prove that they were entitled to overtime pay, and further, that the amount claimed and awarded by the learned trial Judge was not proved to the required standard.

13. According to clause three (3) of the CBA signed by the parties on 10th September, 2013, normal working hours consisted of eight (8) hours of work per day on a normal working week, and five (5) hours a day on Saturday. Clause four (4) which addressed overtime provided that an any time worked in excess of the normal hours of work per day defined under clause three would entitle an employee to be paid overtime at the rate of one and a half times his normal rate of wages per day. Clause four (4) further stipulated that for any time worked on Sunday, overtime was payable at double the normal rate of wages per day.

14. The Staff movement and hours summary report availed by the respondents showed that the respondents on diverse dates reported earlier than 8.00 a.m. and clocked out after 5: 00 p.m., meaning they were at work for more than the required eight hours. The assertion by the appellant to the effect that although the respondents reported to work early, they did not start work until 8.00 a.m., and that they stopped working immediately at 5.00 p.m., as they waited for transport out of the work site is incredible, and is not supported by evidence. The respondents' claim, on the other hand, is supported by documentary evidence which established that they were at their place of work for more than the normal eight working hours per day. Since the respondents sufficiently established their claim on a balance of probabilities, it was incumbent upon the appellant to rebut this evidence, which in our

considered view, they failed to do so. It was also clear to us that it was the appellant who put in place the clocking in and clocking out system at the work site and therefore it was disingenuous on their part to disown the same system and the import of the information contained in the reports generated by the system which was produced in evidence by the respondents.

15. This Court in Manchester Outfitters Limited v Tailors and Textiles Workers Union (Civil Appeal 89 of 2018) [2024] KECA 304 (KLR) (15 March 2024) (Judgment) observed as follows:

> " There is a distinction between the legal burden of proof and evidentiary burden of proof. This distinction is expounded in Halsbury's Laws of England, 4th Edition, Volume 17 [para 13 and 14] which provides:
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> > " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."
>
> The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden.
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> Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?"

16. 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.

17. We hold the same view with regard to the quantum of the overtime pay claimed by the respondents. The fact that the CBA dated 10th September, 2013, governed the employer- employee relationship between the appellant and the respondents, and that it particularly provided for the rates to be applied during payment of overtime hours worked, was not contested by the appellant.

18. The respondents provided a computation of the amounts owed which were founded on the overtime payment rates provided in the CBA. The amount awarded by the learned trial Judge was pleaded and proved. The appellant did not adduce any evidence to controvert the amount pleaded. We hold the same view as the learned trial Judge that the respondents proved their claim for overtime pay to the required standard of proof on a balance of probabilities.

19. From the foregoing, we find that the appeal lacks merit. It is dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF MARCH, 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.