**A.A Bayusuf & Sons & another v Muruka (Civil Appeal E114 of 2021)**
**[2024] KECA 1906 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1906 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT MOMBASA**

**CIVIL APPEAL E114 OF 2021**

**AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA**

**OCTOBER 11, 2024**

**THE APPEAL HAS NO MERIT AND IS**

**HEREBY DISMISSED IN ITS ENTIRETY WITH COSTS TO THE RESPONDENT.**

**BETWEEN**

**A.A BAYUSUF & SONS ..... 1ST APPELLANT**

**ZEDEKIACH AGIRA ..... 2ND APPELLANT**

**AND**

**GEOFFREY WANDERA MURUKA ..... RESPONDENT**

***(Being an Appeal from the Decision/Judgment of the Employment and Labour Relations Court at Mombasa (Ongaya, J.) delivered on 4th day of June, 2021 in Mombasa ELRC CA. No. 973 of 2016)***

## JUDGMENT

1. Geoffrey Wandera Muruka, the respondent, filed a Memorandum of claim on 22nd December 2016 seeking judgment against A.A. Bayusuf & Sons and Zedekiach Agira, the appellants, for:

    a. One month salary in lieu of notice Kshs. 11, 623.20.

    b. Unpaid leave for 17 months 12597.90 x 17months x 1.75/26 Kshs.13, 299.00.

    c. Overtime worked and not paid per Security Protective Order 11623.20 x 1.5 x 2hours x 30days x 17 months/ 26 Kshs.683, 910.00.

    d. Days worked but not paid Kshs.11, 623.20 x 7 days / 26 Kshs.3, 129.30.e) Off days worked but not paid for 17 months 11623.20 x 2hours x 4weeks x 17months/26 Kshs.9, 835.00.

    e. Working on public holidays 11 days 11623.20 x 11 x 2/26 Kshs.9, 835.00.

f. Underpayment on the gross salary (B.S +H. A) (11, 623.20 – 10, 500) X 17months Kshs. 139, 478.40.

Total Kshs.941, 168.20

g. Certificate of service and costs and interest.

2. The respondent claimed that the 1st appellant was his employer while the 2nd appellant was employed by the 1st appellant as a foreman at the 1st appellant's construction sites. He claimed that he was verbally employed as a security guard on 2nd June 2015 and earned a salary of Kshs. 10, 500 per month. Initially, he was deployed to the Likoni site and later to the Kilifi site. He stated that he worked from 6.00 a.m to 6.00 p.m and was not paid any overtime. He was not given weekly off duty and that he worked on Sundays and public holidays without due compensation. He further claimed that his employment was terminated verbally on 7th November 2016 without notice and without reason.

3. In response, the appellants filed their defence on 29th July 2017 where they stated that the respondent was employed by a letter of appointment and commenced work on 20th July 2015. He was hired by way of a letter of posting and reported on duty on 20th July 2015. He was paid Kshs. 6,000 for the days worked; that the working shift commenced at 8.00 a.m upto 5.00 p.m and any overtime was recorded and paid for; that the payment sheets did not show that the respondent worked overtime, and as a result the was not listed as having been due for payment of overtime. They claimed that the respondent utilized his leave days when he took leave in October as approved but that, thereafter, he deserted duty; that his salary of Kshs.10, 500 was paid by M-pesa No. KKxxxxXUQC. They therefore claimed that the respondent had no cause of action and prayed that the suit be dismissed.

4. During the hearing, the respondent reiterated the contents of the claim and went on to deny having absconded from duty. It was his evidence that when he reported on duty on the material day, he found another security guard, one Hussein working in his position who told him to report to director Latif; that he was informed by Latif to leave as there was no work for him.

5. In support of their case, the 1st appellant's Human Resource Manager, Anthony Marani Situma testified that the respondent was a day time watchman who worked during the day and was not entitled to overtime. He stated that the respondent absconded from duty after he signed leave forms requesting to proceed on leave in September 2016; that he was paid his salary for October 2016 of Kshs. 10, 500, which was his last monthly payment. The payment was made on 6th October 2016 by M-pesa. Thereafter, the respondent absconded from duty on 1st November 2016 and, when he called him, the respondent informed him that he had no fare to travel back from Western Kenya. He requested for his October salary to be sent to him to enable him travel back. However, he did not produce evidence of that telephone conversation.

6. The trial Judge, upon considering the dispute, allowed the respondent's claim and entered judgment against the appellants for Kshs. 851,415 comprising 10 months gross wages at Kshs. 11,000 per month totaling Kshs. 110,000; one month's salary in lieu of notice of Kshs 11,000; 7 days' pay for work in November 2016 of Kshs. 2,961.50 and annual leave of Kshs. 13,299.60; overtime, off days and public holidays computed at the rate of Kshs. 11,000 per month awarded in the following terms:

i. Off days Kshs.57,538.50.

ii. Overtime Kshs.647,307.70.

iii. Work on public holidays Kshs.9,307.70

7. The appellants were ordered to pay the amount awarded by 1st August 2021, failing which interest at court rates to accrue from the date of the judgment until the date of full payment, to deliver the respondent's certificate of service within 30 days from the date of this judgment, and to pay the costs of the suit.

8. Aggrieved, the appellants have filed an appeal to this Court on the grounds that: the learned Judge was in error in law and in fact by failing to consider the appellants evidence that the respondent absconded from duty and that the respondent was not entitled to any overtime; failing to appreciate that the respondent's evidence did not meet the threshold to grant the amount awarded in the judgment; in failing to consider the appellants submissions; in failing to evaluate the evidence thereby reaching a wrong decision; in failing to appreciate the case law relied upon by the appellants having regard to the context and special facts of the claim.

9. Both the appellants and the respondent filed written submissions. When the appeal came up for hearing on a virtual platform, learned counsel for the appellants Mr. B. Amadi submitted that the respondent deserted duty on 1st November 2016 and that his employment was terminated for failure to report back to work from leave. Counsel cited the case of *Richard Kiplimo Koech v Yuko Supermarket Ltd* [2015] eKLR for the proposition that absconding duty is an act of misconduct on the part of the employee, in which case the requirements of section 41 of the *Employment Act* was applicable to the circumstances; that, on this basis, the respondent did not prove his claim of unfair termination to the required standards.

10. Counsel further submitted that the respondent was not entitled to overtime as the attendance sheets he relied on were not signed by the appellants.

11. In their written submissions, learned counsel Ms. Kieti holding brief for Mrs. Katu for the respondent submitted that, on the allegation of desertion of employment, 'No Show Cause Letter' written to the respondent by the appellants requesting about his whereabouts or why he should not be terminated, and nor was there any letter addressed to the nearest Labour Office notifying him of his failure to return to work or a text message informing him that he had absconded from duty. It was submitted that without any communication to this effect, nothing disclosed that the respondent absconded from duty, but instead pointed to his employment having been terminated by the appellant; that the respondent proved his claim to the required standard and that the attendance sheets confirmed that he was actually working overtime, but was not paid his overtime or terminal dues; that, the appellants did not file any evidence that proved that they paid the respondent for the extra hours worked and that the trial court rightly awarded the respondent Kshs. 647,307.70 as overtime.

12. This being a first appeal, the role of the first appellate court was well settled. In *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

13. This duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence was also reiterated in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.

14. Having evaluated the record of appeal as well as submissions by parties to the appeal, we find that the issues for determination are:

    i) Whether the respondent's termination was unfair for want of a valid or genuine reason; and

    ii) Whether the respondent proved his claim for overtime.

15. According to the evidence, it is not in dispute that the respondent was employed by the 1st appellant as a security guard on 2nd June 2015. What is in dispute is that the respondent has alleged that he was dismissed by the appellants on 7th November 2016, while the appellants' defence is that the respondent was not dismissed, but that he had deserted from his duties on 1st November 2016 and that he was duly paid his salary for the days worked in the month of October 2016.

16. The procedure for termination of employment is set out in sections 41, 43 and 45 of the Act.

17. Section 41 provides that:

> ""1. Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
>
> 2. Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make."

18. In the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR, the Court, considering the procedures set out above, explained the dismissal process thus:

> "...Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."

19. However, the appellant contends that the respondent was not dismissed from employment but had absconded from duty whereupon his employment was terminated. Given the circumstances of this case and the nature of the allegation made by the appellants against the respondent, it is trite law that he who alleges must prove.

20. In the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2005] 1 EA 334, this Court held:

> " "As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* cap 80, which provides:
>
> "107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
>
> 20. There is however the evidential burden that is cast upon any party of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act, thus:
>
> "109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."
>
> The two sections carry forward the often repeated evidential adage: "he who asserts must prove".

21. In the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, this Court had the following to say on the burden of proof:

> " There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act/Rules*. Finally, the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee."

22. As concerns the appellants' assertion that the respondent absconded from duty, the record does not disclose that evidence was produced showing that the respondent absconded from duty. The appellants did not produce any attendance register to demonstrate that the respondent absented himself from work on the first week of November 2016. Furthermore, though the appellants claim to have sent him money through his mobile telephone, which meant that it was possible to have communicated with him, there was nothing to show that the respondent was requested to show cause why he should not be dismissed for failing to report on duty or notifying him that he risked being terminated from employment for absconding from duty.

23. In controverting the appellants' evidence, the respondent testified that he reported on duty in November, but found another security guard in his position. He claimed to have been informed that there was no work for him. The inference being that, having reported on duty and informed that his services were no longer required, the respondent had effectively terminated his employment without notice. On the basis of these facts, nothing demonstrated that the respondent had absconded from duty, with the result it becomes clear that the appellants did not terminate the respondent's employment in accordance with section 41 as set out above.

24. Accordingly, we are satisfied that the trial Judge rightly held that the termination of the respondent's employment was procedurally unfair and contrary to the requirements of sections 41(1), 43 and 45 of the Act.

25. Turning to the claim for overtime, the trial Judge held that:

> " The Court therefore finds that the claimant has established, on a balance of probability, that he worked extra hours as claimed and on the off days and public holidays. He is awarded as computed except on basis of Kshs. 11,000.00 per month as follows:
>
> a. Off days Kshs. 57, 538.50.
>
> b. Overtime Kshs. 647, 307.70.
>
> c. Work on public holidays Kshs.9, 307.70
>
> Section 27 of the *Employment Act* provides that an employer shall regulate the working hours of each employee in accordance with the provisions of the Act and any other written law. That the bare minimum working hours at the moment is 8 hours a day for normal office hours.

26. The Regulation of Wages (Protective Security Services) Order, 1998 provides for overtime. It specifies that:

> " 7. Overtime.
>
> 1. An employee who works for any time in excess of the normal hours of work specified in paragraph 6 shall be entitled to be paid for the overtime thereby worked at the following rates –
>
> a. one-and-a half times his normal rate of wages per hour in respect of any time worked in excess of the normal hours of work; and
>
> b. twice the normal rate of wages per hour in respect of any time worked on a rest day.
>
> 2. For the purpose of calculating payment for overtime in accordance with subparagraph (1), the basic hourly rate shall, where the employee is not employed by the hour, be deemed to be one-two hundred and twenty-fifth of the employee's basic monthly wage."

27. The appellants contend that the trial Judge was in error in relying on the attendance sheets produced by the respondent because they were not on paper headed with the 1st appellant's name, and were only

signed by the respondent and not the appellants. Though the attendance sheets were not included in the record before us, the proceedings show that on 20th June 2019, the respondent's attendance sheets were admitted by consent of the parties.

28. In this regard, the trial Judge had this to say:

> "... on overtime, off days and public holidays worked but not paid, the claimant exhibited the record he signed showing the check-in times and dates. The claimant filed a notice to produce as envisaged in section 74 of the *Employment Act*. The respondent failed to produce evidence to rebut the claimant's evidence. The Court therefore finds that the claimant has established on a balance of probability that he worked extra hours as claimed and on the off days on public holidays."

29. As observed by the trial Judge, the appellants did not produce any evidence to the contrary that showed either that the respondent was not entitled to accrued overtime or that it had paid the accrued overtime to the respondent. It is also instructive that the appellants did not produce any evidence challenging the veracity of the attendance sheets that were before the trial court. As such, just like the trial Judge, we find that the preponderance on a balance of probabilities based on the evidence proved that the respondent was entitled to the amount claimed in overtime.

30. In view of the foregoing, the appeal has no merit and is hereby dismissed in its entirety with costs to the respondent.

31. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF OCTOBER, 2024.**

**A. K. MURGOR**

**.....**

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA Carb, FCIArb.**

**.....**

**JUDGE OF APPEAL**

**G. V. ODUNGA**

**.....**

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**