



REPUBLIC OF KENYA



KENYA LAW
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**Omune v Ray Store Limited (Appeal E060 of 2023)
[2025] KEELRC 130 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 130 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E060 OF 2023
JK GAKERI, J
JANUARY 29, 2025**

BETWEEN

PETER OOKO OMUNE APPLICANT

AND

RAY STORE LIMITED RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of the Principal Magistrate (J Wesonga) delivered on 6th October, 2023 against the appellant in the sum of Kshs.75,000.00 with interest at court rates from date of judgment till payment in full.
2. Briefly, the facts of the case are that the respondent employed the claimant as a driver in 2013 and he drove Motor Vehicle Registration Number KAV 540F, at Kshs.15,000 per month as at the date of separation.
3. The claimant admitted that all statutory deductions were made.
4. On 17th August, 2022, the Claimant was sent to Mbita to make deliveries and left Homa Bay at 7:00am arrived in Mbita at 7:55am concluded offloading at 12:00pm and arrived at 1820hrs and left after hanging keys at the usual place and did not talk to the boss.
5. According to the respondent however, when the claimant returned and was questioned about being late, he became angry and was harsh, dropped the keys on Mr. Patel's desk and went out and a request to park the lorry at the parking lot was ignored and did not report to work on the following day and did not pick Mr. Patel's call.
6. That on 27th September, the respondent received a demand letter.



7. The respondent filed a counter claim on the premises that the claimant did not exercise reasonable care, act in good faith and did not honour his part of the contract and the respondent was thus entitled to damages.
8. The trial court found that termination of the claimant's was unfair and awarded the equivalent of 2 month's salary as compensation, salary in lieu of notice, salary for the month of August, a total Kshs.75,000.00 with interest at court rates.
The court found counter-claim unproven.
This is the decision appealed against.
9. The appellant faults trial court's judgment on the grounds that the trial court erred in law and fact by:
 1. Misapprehending the claim and proceeding on wrong principles of law by not awarding overtime and house allowance.
 2. Overlooking Section 31(1) of the *Employment Act* by dismissing the claim for house allowance and leave allowance.
 3. Failing to consider that the appellant has the right to proper remuneration.
 4. Failing to have regard to the appellant's evidence, written submissions and judicial authorities.
10. The foregoing grounds may be condensed to three namely failure to consider the evidence, and failing to award certain reliefs and fair remuneration.

Appellant's submission

11. The appellant addressed the issue of reliefs exclusively.
12. On leave allowance, the appellant argues that he is entitled to the same as the respondent had no record to show that the appellant proceeded on leave or was paid.
13. Reliance was made on Section 10(9) and 74 of the *Employment Act* and the decision in David Joseph Wanyonyi V Kenya Nut Co. Ltd [2018] eKLR to submit that the respondent failed to discharge the burden of proof on leave allowance.
14. On house allowance, reliance was made on the decision in James Muriithi Ileri V Njuca Consolidated Co. [2021] eKLR.
15. Concerning overtime, reliance was made on Section 27(2) of the *Employment Act* to urge that the appellant was not granted rest days.
16. This being a first appeal it is essentially a retrial as held in *Selle and Another V Motor Boat Co. Ltd* [1968] EA 123 as follows:
17. 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 conclusion. 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, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."



18. Looking at the record before the court there are two different versions of events, one version is that the respondent verbally terminated the appellant's employment on the evening of 17th August, 2022 as he was told not to set foot in the employers premises and did not report back there.
19. The other version is that on 17th August, 2022 the respondent told the appellant to go home, which he did but reported on the following morning ready to work and found a new driver and left.
20. The respondent's evidence was that the appellant, on inquiry about being late was angry and harsh, dropped the keys and stormed out of the office and did not return.
21. From the evidence on record it is not difficult to infer that the appellant and Mr. Patel had a single encounter with the appellant on the evening of 17th August, 2022.
22. The alleged reporting on 18th August, 2022 and finding another driver does not in the Court's view sound credible as the claimant was answerable to Patel and did not testify that he talked to him on that day or anyone else for that matter. Similarly, he did not testify that he could not trace his keys where he had left them or who the new driver was.
23. According to the respondent, the appellant deserted the workplace on 17th August, 2022 and did not return or respond to calls by Mr. Patel.
24. However, the respondent adduced no evidence to demonstrate the reasonable steps it took to have the appellant resume duty or subject him to a disciplinary process for the alleged desertion.
25. The law imposes a duty on an employer who alleges that an employee has deserted to demonstrate the reasonable attempts it made to contact the employee and/or a notice to show cause was dispatched to the employee on account of the desertion.
26. See *Simon Mbithi Mbane V Inter Security Services Ltd* [2018] eKLR, *Joseph Nzioka V Small Coatings Ltd* [2017] eKLR, *Felistas Acheha Ikatwa V Charles Peter Otieno* [2018] eKLR and *Richard Kiplimo Koech V Yako Supermarket Ltd* [2015] eKLR.
27. In *Judith Atieno Owuor V Sameer Agriculture & Livestock Ltd* [2020] eKLR Onyango J expressed herself as follows:

Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the *Employment Act*, 2007. No evidence was availed to the Court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the Respondent to show this Court it did accord the Claimant a fair hearing prior to her termination”.

These sentiments apply on all fours to the circumstances of this case.

28. Having failed to demonstrate that the appellant absconded duty or deserted the workplace or was taken through a fair disciplinary process when his employment was terminated on 17th August, 2022, it is the finding of this Court that the separation was unfair for want of procedural propriety.
The foregoing disposes of ground 4 of the Memorandum of appeal.
29. As regards the right to proper remuneration, it is trite that the right to fair labour practices under Article 41 of *the Constitution* of Kenya encompasses the right to reasonable remuneration not proper remuneration and the appellant has not assailed the trial court on any finding on this aspect.
30. The appellant did not plead or allege that he was underpaid or was not paid a salary consistently for services rendered.



31. The claim for leave allowance, house allowance and overtime will be dealt with together.
The foregoing disposes of ground 3.
32. Finally, on the reliefs sought, the trial Court did not award overtime, house allowance and unpaid leave allowance.
33. On house allowance, the provisions of Section 31 of the Employment Act are unambiguous that provision of housing is the obligation of the employer.
34. In this case, the respondent adduced no evidence to prove that it provided the appellant with housing or paid a housing allowance or that the appellant's salary was consolidated.
35. The fact that the appellant did not plead the amount due to him as housing allowance is not sufficient to deny him a statutory right under Section 31 of the Employment Act.
36. As held in *Grain Pro Kenya Inc. Ltd V Andrew Waitthaka Kiragu* [2019] eKLR 15% is a reasonable percentage that an employee spend from part of a salary to pay house rent”
37. In the circumstances, the appellant is entitled housing allowance (at 15%) for a period of 3 years by virtue of Section 89 of the Employment Act), Kshs.81,000.00.
38. As regards overtime, the trial court dismissed the claim for want of supportive documentary evidence or attendance register.
39. Relatedly, the appellant led no evidence to prove that he and other employees used to sign in and sign out, an allegation, which would have necessitated the production of the attendance and exit registers by the respondent.
40. Equally, the appellant's written witness statement makes no reference to reporting and exit times and on cross-examination the appellant confirmed that he used to report between 7:30 and 8:00am and did not testify as to when he would exit the workplace.
41. In the absence of supportive evidence, the claim for overtime is unsustainable and the trial court's finding is upheld.
42. Concerning leave allowance, the trial court found that as the amount claimed was uncertain the same could not be awarded.
43. The appellant prayed for unpaid leave allowance for 8 years but did not specify his leave entitlement.
44. It requires no belabouring that leave allowance is a contractual term not a statutory entitlement and the same is certain and is paid annually.
45. In the absence of any specific amount claimed and being a species of special damages, which must be specifically pleaded and strictly proved, the claim for leave allowance is unsustainable and the trial court's finding is upheld.
46. The upshot of the foregoing is that the appeal is partially successful and the sum of Kshs.75,000.00 awarded by the trial court is interfered with and substituted with a sum of Kshs.156,000.00.
47. In the circumstances each party shall bear their own costs in this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 29TH DAY OF JANUARY, 2025.

DR. JACOB GAKERI



JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

