



**Kimani v Lavington Security Limited (Appeal E015 of 2024)
[2025] KEELRC 603 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 603 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL E015 OF 2024
J RIKA, J
FEBRUARY 28, 2025**

BETWEEN

GATHOGO KIMANI APPELLANT

AND

LAVINGTON SECURITY LIMITED RESPONDENT

(Being a partial Appeal from the Judgment of the Hon. SPM Stephen O. Mogute, in Nyabururu Chief Magistrate's Court, E&LRC Number E008 of 2022, delivered on 27th February 2024)

JUDGMENT

1. At the Trial Court, the Appellant pleaded that he was employed by the Respondent as a night guard, on 1st October 2019.
2. He left employment on 1st October 2021, under circumstances the Trial Court affirmed, constituted a redundancy situation.
3. He was paid a monthly salary of Kshs. 9,600, which he pleaded, was an underpayment.
4. He prayed for underpayment of monthly salary, overtime, off-duty days, public holidays, annual leave and severance pay.
5. The Trial Court granted a Judgment partly in his favour, on 27th February 2024. He was awarded: - Underpayment of salary at Kshs. 97,749. Annual leave at Kshs. 13,572. Severance at Kshs. 13,572. Total... Kshs. 124,895.
6. He was awarded costs and interest.
7. He filed this Appeal through a Memorandum dated 21st March 2024. His grounds are: -



- I. The Trial Court erred by not granting overtime on the ground that the Appellant did not testify on overtime, while he adopted his witness statement, containing such evidence.
 - II. The Trial Court erred by not granting public holiday pay.
 - III. The Trial Court erred on the prayer for off-duty days.
 - IV. The Trial Court erred by failing to grant the prayer of off-duty days, which was unchallenged by the Respondent, and which had been granted by the Labour Office.
 - V. The Trial Court erred by lessening the amount due to the Appellant.
 - VI. The Trial Court erred by failing to consider the submissions filed by the Appellant.
8. The Appellant proposes that the Appeal is allowed.
 9. The Parties agreed to have the Appeal considered and determined on the strength of the Record of Appeal, and their respective submissions. They confirmed filing and exchange of submissions, at the last appearance before this Court, on 11th December 2024.
 10. The Appellant submits that he pleaded and gave evidence, that he worked for 12 hours daily. He was not cross-examined on this. The Respondent did not present employment records to discount the Appellant's prayer on overtime. He submits that he was entitled to overtime of 4 hours daily, 24 hours a week for 24 months, at Kshs. 286,116. He relies on [Legal Notice No. 2 of 2018](#).
 11. He submits that, he disclosed that he worked during public holidays and rest days, in his witness statement. He submits that the public holidays in question, are identified under Section 2 of the [Public Holidays Act](#).
 12. The Trial Court ignored a letter from the County Labour Office, which established that the Appellant was entitled to 96 off-duty [rest] days.
 13. Based on [Legal Notice No. 2 of 2018](#), the Appellant submits that 96 off-duty days, would have yielded compensation in the amount of Kshs. 190,736, while 22 public holidays worked for 2 years, would have earned him Kshs. 43,710.
 14. Off-duty days are separate from the public holidays. Section 27[2] of the [Employment Act](#), provides for at least 1 rest day every week, for an Employee.
 15. On underpayment, the Appellant submits that the [Legal Notice No. 2 of 2018](#), provided for basic salary of Kshs. 14,038 for night guards. The housing element would attract 15% of the basic salary under the Regulation of Wages [General] Order. His gross monthly salary ought to have been Kshs. 16,143. The total underpayment, ought to have been Kshs. 159,448. He was granted Kshs. 97,749 by the Trial Court. He submits that he merits the difference, at Kshs. 61,699.
 16. In total, he urges the Court to enhance the sum granted to him, to Kshs. 591,162.
 17. The Respondent submits that it has already settled the Judgment of the Trial Court.
 18. He who alleges must prove. The Appellant did not prove overtime worked on public holidays and rest days. He merely pleaded in the Statement of Claim and his witness statement, that he worked for 12 hours a day. The details of overtime worked were not given. He serialized public holidays in a calendar year, without specifying during which holidays he was at work.
 19. He failed to tabulate overtime pay, public holidays and off-duty days in his Statement of Claim, but purported to do so in his final submissions.



20. Relying on the Court of Appeal decision, Douglas Odhiambo Apel [not Ape] & Another v. Telkom Kenya Limited [2016] e-KLR, the Respondent submits that facts must be established through evidence, not through the pleadings and submissions. The letter from the Labour Office, was not proof of the Appellant's off-duty days' entitlement. The Trial Court correctly found that the Appellant was not entitled to these prayers.
21. The Respondent urges the Court to decline the Appeal with costs.

The Court Finds: -

22. This Appeal shares the same background, as this Court's Appeal Number E013 of 2024 (Omanga v. Lavington Security Limited) and Appeal Number E014 of 2024 (Bii v. Lavington Security Limited). Same Judgment was made by the Trial Court, based on the same facts and application of the law. The Memorandum of Appeal is common to all the Appeals.
23. The Court made the following Judgment in the 2 Appeals above: -
 - a. In the Appellant's substituted witness statement dated 29th August 2023, he states at the last paragraph page 1 of 3 [page 46 of the Record of Appeal] as follows:

“ I therefore seek from this Court, directions to the Respondent to pay the said reliefs. I shall file the respective tabulations and documentation outlaying the same in my submissions.”
 - b. He did not plead any figures in his Statement of Claim. His substituted witness statement, which he adopted as his evidence, did not contain any tabulation. He instead gave an undertaking to supply the figures, on submissions.
 - c. He included figures to his prayers, in his submissions before the Trial Court, and those filed here on Appeal.
 - d. As held in the Court of Appeal decision, David Odhiambo Apel & Another v. Telkom Kenya Limited [2016] e-KLR, submissions are not evidence. They are a way, through which the Parties and their Representatives, crystallize the substance of their respective cases. They are neither pleadings, nor evidence. For submissions to be upheld by the Court, they must be preceded by, and founded on established facts.
 - e. There was no evidence placed before the Trial Court by the Appellant, showing that he worked overtime, worked on public holidays and rest days. It was not sufficient to name the public holidays in a calendar year, and to submit on *Public Holidays Act* after the hearing. It was not sufficient to file elaborate submissions supplying details of the Claim, which were not placed before the Trial Court through the pleadings and evidence presented before the Trial Court.
 - f. When would the witnesses for the Respondent challenge or comment on the figures submitted by the Appellant? When would such figures be subjected to cross-examination?
 - g. The Regulation of Wages [Protective Security Services] Order, 1998 makes provision for hours of work, overtime, weekly rest, and public holidays work, in the industry. An Employee claiming under these provisions has an evidential burden, of establishing that his Employer acted in breach of the provisions. It is not enough to point to a provision of the law, without establishing facts to which the legal provision applies.
 - h. Whereas Section 74 of the *Employment Act* requires an Employer to keep custody of employment records, including those relating to weekly rest days, hours of work, public



holidays and holiday pay, it remains the primary evidential responsibility of a Claimant / Employee, to supply evidence to the Court, to establish entitlement to these benefits.

- i. The Appellant was content to plead that the Respondent was the custodian of the records, and obliged to produce the records, under Section 10[7] of the *Employment Act*.
- j. He did not himself supply even the most rudimentary evidence, to show that he worked overtime, on public holidays and rest days.
- k. He could have notified the Respondent to produce the relevant employment records which are deemed to be in the custody of the Respondent, to establish his prayers on evidence, rather than through final submissions. The Court in any event, is of the view that reverse burden of proof, would only apply under Section 10 [7] of the *Employment Act*, where the Employer has failed to exhibit a written contract or written particulars prescribed under subsection 1.
- l. The Claimant's written contract was exhibited before the Trial Court. His consolidated monthly was identified. He was entitled to 1 rest days weekly. The provisions of the Regulation of Wages [Protective Security Services] Order, 1998 were incorporated in his written contract. Any benefits not specifically included in the written contract, were implied from the Wages Order.
- m. The issue before the Trial Court was not whether the Appellant's contract entitled him to overtime, public holidays and rest days. The contract was exhibited and established entitlement. The issue was whether the Appellant adduced evidence, showing that he had worked excess hours, on public and rest days. The burden of proving that the Appellant worked excess hours, and worked on public and rest days, was not reversed by Section 10[7] of the *Employment Act* to the Respondent. The written contract was exhibited, and the Claimant's entitlement to the terms outlined in the contract, read with the Industry Wage Order, was not contested. The issue was whether the Appellant had placed evidence before the Court, establishing that he worked on specific days and hours claimed, to warrant overtime pay and holiday pay. The record does not show that he supplied the Court with any evidence, to justify these prayers.
- n. The findings or recommendations of the Labour Office, do not bind the Court. The letter from the Labour Officer alluded to by the Appellant, which is said to have established that he was owed rest days, did not bind the Trial Court. The Labour Officer makes recommendations to parties under Section 47 [2] of the *Employment Act*, based on his opinion as to the best means of settling the dispute. Opinion of the Labour Officer, is not conclusive evidence of matters which are disputed before the Court.
- o. On underpayment of salary, it was common ground on trial, that he Appellant was paid a monthly salary of Kshs. 9,600 (not Kshs. 9,500). The salary was described as consolidated, in the Appellant's contract.
- p. Regulation 5, of the Regulation of Wages [Protective Security Services] Order entitled the Appellant to 15% of his basic salary, in house allowance.
- q. The Respondent submits that if there was underpayment, it was in the sum of Kshs. 13,572 less Kshs. 9,500 = Kshs. 4,072 monthly = Kshs. 97,917 over a period of 24 months. Working on a monthly basic salary of Kshs. 9,500, the Trial Court granted the Appellant underpayment of salary, for 24 months, at Kshs. 97, 949.



- r. The Appellant did not work in Nairobi, Mombasa or Kisumu cities. His contract indicates that he worked at NCPB in Subukia, which the Court thinks, would fall within former Town Councils, under the Legal Notice.
 - s. His contract designated him a security guard. It is not specified if he was a night or day guard. The Respondent had the legal duty to particularize the Appellant's designation, failing which, the Court would uphold the position of the Appellant, that he was a night guard.
 - t. His applicable basic monthly rate, was Kshs. 14, 038.
 - u. The Legal Notice invoked by the Parties, specifies that daily and hourly rates, include house allowance.
 - v. House allowance is not included in the monthly rates. It is only stated to be inclusive, of daily and hourly rates. A scrutiny of the daily and hourly rates applicable, do not disclose a correlation, with the monthly rates.
 - w. As concluded above, Regulation 5 of the Industry Wage Order, requires Employers to pay 15% of the basic salary in house allowance.
 - x. The Appellant was entitled to 15% of the applicable monthly salary of Kshs. 14,038 as house allowance. His monthly consolidated salary, ought to have been Kshs. 16, 143.
 - y. He was paid Kshs. 9,600 monthly. He was underpaid by Kshs. 6,543 monthly. In 24 months served, he was underpaid by Kshs. 6,543 x 24 = Kshs. 157,032.
 - z. He was awarded and paid Kshs. 97, 749. He merits the balance of underpayment of salary, which the Court grants at Kshs. 59,283.
24. The same orders granted in the other two related Appeals, are granted herein, as follows-
- It Is Ordered: -
- a. The Appeal is partly allowed.
 - b. The Respondent shall pay to the Appellant, the balance of underpayment of salary at Kshs. 59,283.
 - c. No order on the costs.
 - d. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAKURU, THIS 28TH DAY OF FEBRUARY 2025.

JAMES RIKA

JUDGE

