



REPUBLIC OF KENYA



Sierra Flora Limited v Kerubo (Employment and Labour Relations Appeal E029 of 2023) [2025] KEELRC 664 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 664 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E029 OF 2023
AN MWAURE, J
FEBRUARY 28, 2025**

BETWEEN

SIERRA FLORA LIMITED APPELLANT

AND

DORCAS KERUBO RESPONDENT

(Being an Appeal from the Judgment and orders of the Honourable K. Kibelion, Principal Magistrate delivered on 2nd October in Nakuru MCELRC No. E030 of 2022)

JUDGMENT

1. The Appellant being dissatisfied by the judgment and orders of the Honourable Principal Magistrate K. Kibelion filed this appeal vide a Memorandum of Appeal dated 16th October 2023 on grounds that: -
 - a. The learned trial magistrate erred in law and in fact in by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent Kshs.29,980/= being annual leave.
 - b. The learned trial magistrate erred in law and in fact by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent Kshs. 48,616.60/= as payment for public holidays
 - c. The learned trial magistrate erred in law and in fact by failing to consider by the Appellant by awarding the Respondent costs of the suit.
 - d. The learned trial magistrate totally misdirected himself in delivering the Judgment in favour of the Respondent, failing to consider and appreciate the evidence on record, thus reaching a wrong and unfair conclusion in awarding the Claimant/Respondent payment for annual leave and public holidays.



- e. The learned trial magistrate erred in law and fact in disregarding the evidence adduced by the Appellant in the award to the Claimant/Respondent resulting in unjust enrichment of the Respondent to the unfair detriment of the Appellant.
2. The Appellant prays that:
 - a. The Appeal be allowed
 - b. The Judgment of Honourable K. Kibelion made on 2nd October 2023 in Nakuru CMELRC No. E030 of 2022 Dorcas Kerubo versus Sierra Flora Limited, be set aside in entirety and be substituted by appropriate orders of this Honourable Court.
 - c. That this Honourable court do dismiss the Respondent's case in Nakuru CMELRC No. E030 of 2022 Dorcas Kerubo versus Sierra Flora Limited, with costs to the Appellant.
 - d. The Appellant be awarded the costs of this Appeal.
 3. This appeal was disposed of by way of written submissions

Appellant's submissions

4. The Appellant submitted that the Respondent was duly paid her annual leave according to the leave forms presented before the trial court and pay slips showing she was also paid during public holidays she worked during her employment.
5. The Appellant relied on Section 74(1)(f) of the *Employment Act* which states that employers are required to maintain a written record of their employees, which must include details about each employee's annual leave entitlement, days of leave taken, and the number of leave days still due, as outlined in Section 28 of the Act.
6. The Appellant submitted since the employment records, leave forms and pay slips were presented by the defence at trial, the Appellant duly discharged its burden of proof. The Appellant relied on the case of Reef Hotel Limited V Josephine Chivatsi [2021] eKLR the court cited the Court of Appeal case of Rogoli Ole Manadieggi V General Cargo Services Limited [2016] eKLR stating that the employer is the custodian of employment records. The employee claiming overtime has not proven their claim due to the employer's failure to present employment records in court. The responsibility of proving overtime hours or days beyond the legal limit lies with the employee. The claimant did not provide evidence in the trial court of when they worked extra hours, on public holidays, or rest days, nor did they justify the total amount claimed in overtime by explaining how it was calculated.
7. In Rogoli Ole Manadieggi V General Cargo Services Limited (supra) the court held that the employee needs to prove his case on a balance of probability, even where such records are not made available as the Appellant did not do so instead claimed annual days for the entire period in employment.
8. In Musaki V Vickers Security and Another [2023] KEELRC 982 (KLR) the court held as follows:

“The 1st Respondent produced in evidence duly executed leave application forms, duly signed by the Appellant for the years 2016, 2017, 2018, and 2019 where the Appellant is shown to have taken thirty calendar days' leave. The Appellant did not challenge the authenticity or validity of the said documents in his evidence. The leave form for the year 2019 shows that the Appellant had no remaining leave days as at May 4, 2019. I uphold the dismissal of the annual leave claim.”



9. The Appellant argued that the Claimant/Respondent was employed throughout the entire duration of her employment. As a result, the trial court erroneously awarded her unpaid leave as the evidence supporting this claim was not contested, which led to a significant miscarriage of justice by granting such an unwarranted claim.
10. The Appellant submitted and emphasized that the Respondent failed to adduce employment records as annual leave schedules and approval is unfounded, and a blatant disregard of evidence was produced in the defence.
11. The Appellant submitted that this Honourable Court dismisses and sets aside the award of costs and interest of the judgment as it was unjust and unfair.
12. In conclusion, the Appellant urged this Honourable Court to allow the appeal as prayed.

Respondent's case

13. The Respondent submitted that the burden of proof should be on a balance of probability as whoever alleges must prove. The Respondent also submitted that it is trite law that if any party make any allegation in their pleadings, the burden shifts to that party to adduce evidence in support of their case. In the event a party fails, the averments remain as mere denials.
14. The Respondent claimed that she worked on public holidays from 8:00 a.m. to 6:40 p.m. and testified that she also worked during off-duty days. She further stated that she worked continuously without taking off-duty days, which is against section 27(2) of the *Employment Act*. Moreover, the work done on public holidays and off days was not compensated at double the rate as required by labour laws, and her extra working hours were not acknowledged, as her salary remained constant, violating section 27 of the *Employment Act*.
15. The Respondent submitted that the Appellant had access to important documents like the muster roll or attendance sheets but did not present them for unknown reasons. The Respondent relied on Section 28 of the *Employment Act*, which entitles an employee to at least 21 days of paid leave after every 12 consecutive months of service or payment in lieu of leave not taken.
16. The Respondent submitted that the Appellant was under obligations under the provision of Section 74 of the *Employment Act* to keep records such as the muster roll or payment statement indicating the particulars of overtime worked each day, week or month and how she was compensated and in absence of such record, her claim on overtime stands uncontroverted.
17. The Respondent relied on Section 27 of the *Employment Act* which provides for working hours for employees and any hour worked outside the statutory daily must be compensated by the employer. Section 5(2) of the Labour Institution Act provides that normal working hours shall consist of not more than 52 hours of work spread over six days of a week.
18. The Respondent submitted that the evidence presented in the trial court was consistent, supporting the trial magistrate's decision, which was sound, legal, and lawful. Additionally, the Respondent submitted that the learned trial magistrate's decision was based on the evaluation of the evidence on record, justifying the granting of the reliefs sought.



19. The Respondent submitted that costs granted by the learned trial magistrate was lawful. The Respondent relied on the case of Joseph Oduor Anode V Kenya Red Cross Society [2012] eKLR Odunga J observed that:

“... in matters of costs, the general rule... is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the court decides not to follow the general principle, the court is enjoined to give reasons for not doing so...”

20. The Respondent submitted that costs are awarded to compensate the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba’s Judicial Hints on Civil Procedure states as follows:

“The object of ordering a party to pay costs is to reimburse the successful party of amount expenses to which he has been put in fighting an action.”

21. The Respondent submitted that she is entitled to the costs of the suit as she had succeeded in the main suit having proven her case on a balance of probability. The Respondent urges this Honourable Court to maintain the status quo and dismiss the Appellant’s appeal with costs.

Analysis and determination

22. The court has considered and gone through the memorandum of appeal together with the submissions by parties, the issues of determination are as follows:

- a. Whether the learned trial magistrate erred in awarding the Respondent annual leave and public holidays
- b. If (a) above is in the affirmative, whether the Respondent is entitled to costs
- c. Who should bear the costs of the appeal

23. Being the first appellate court, this Honourable Court is cognisant of the principles enunciated in Peters V Sunday Post Limited [1958] EA 424 where the Court of Appeal held as follows:

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

24. There is no contention that the Respondent resigned from the Appellant’s employment on medical grounds. The Appellant accepted her resignation letter dated 17th February 2021.

25. The learned trial magistrate held as follows regarding public holidays and annual leave:

“The Claimant’s claim for public holiday and annual leave succeeds as it was incumbent upon the Respondent who is the custodian of leave schedules and approvals to produce the same



but did not. Consequently, I award a sum of Kshs.48,616.60 for payment of public holidays worked as pleaded and Kshs.29,980/= for annual leave awarding at Kshs. 75,596.60.”

26. This Honourable Court reiterates Section 74 of the *Employment Act* that an employer shall keep records of employment documents. The appellant produced a list of leave days to establish that the Respondent did go on leave on diverse days during her employment. The documents listed as exhibits 52-60 on the documents in the record of appeal show days the Respondent took leave.

27. Furthermore, there is no evidence produced by the respondent to prove she applied for leave and was denied leave.

The court is persuaded by the case of *Ragoli Ole Manadiegi -Vs- General Cargo Services Limited* (2016) eKLR where the court held that an employee needs to prove his case on a balance of probability even where such records are not made available as the Appellant did not do so instead claimed annual days for the entire period of employment.

28. Further the Appellant in acceptance of the Respondent’s resignation also informed her they would pay her for any pending leave days.

The court is therefore persuaded the respondent does not deserve to be paid any dues for unpaid leave and that award by the trial magistrate of Kshs.29,980/= is set aside.

29. The Respondent was also awarded Kshs.48,616/60 being Public holidays. The appellant did not convince the court that they used to pay the respondent for the Public holidays she claimed in her claim or gave her days off during Public holidays. The Respondent could not have records to show the public holidays she performed her duties without compensation but she has articulated them in her claim. The burden of proof being on a balance of probability the court is satisfied the respondent is deserving of the payment for uncompensated Public holidays.

The award of Kshs.48,616/60 is upheld.

30. The appeal having partially succeeded the court orders each party to meet their costs of the lower court case and the present appeal case.

Orders accordingly.

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

ANNA NGIBUINI MWAURE

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 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.



A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

