Riley Falcon Security Services v Wafula (Appeal E001 of 2024)
[2025] KEELRC 1044 (KLR) (31 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 1044 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E001 OF 2024

JK GAKERI, J

MARCH 31, 2025

BETWEEN

RILEY FALCON SECURITY SERVICES ..... APPELLANT

AND

DANIEL NYONGESA WAFULA ..... RESPONDENT

JUDGMENT

1. This is an appeal against the Judgment of Hon. S. Cheruiyot S.P.M dated 26th July, 2023, in Kisumu CMELRC No. E91 of 2021, Daniel Nyonges Wafula V Riley Falcon Security Services Ltd.

2. The brief facts of the case are that the appellant employed the respondent on 9th October, 2014 as a security guard at Kshs.5,600 per month, which rose to Kshs.15,000.00 in 2020 and served diligently until 19th March 2021 when he resigned fearing for his personal security.

3. That he worked for 12 hours daily and only took leave in February, 2021, was not being paid house allowance and was entitled to gratuity and service pay.

4. The respondent sued for unlawful termination, salary in lieu of notice, leave allowance, overtime, underpayment, house allowance and gratuity, a total of Kshs.840,944.41, certificate of Service and costs.

5. The appellant admitted that the respondent was its employee from 2015 serving under yearly contracts renewable subject to performance and job availability and resigned during the currency of the contract scheduled to lapse on 30th January, 2021. That he resigned on 28th January, 2021, proceeded on leave and did not apply for employment.

6. The appellant denied that the respondent had been constructively dismissed and was not entitled to the reliefs sought.

7. While the counsel submitted that the respondent was constructively dismissed and thus entitled to all the reliefs sought, the appellant submitted that the respondent had not alleged any frustration in his resignation letter and no fundamental breach of contract had taken place and he voluntarily resigned by written notice.

8. The appellant urged that none of the prayers sought was merited.

9. The learned trial Magistrate found that the claim for overtime and underpayment were merited and awarded Kshs.79,901.60 and Kshs.279,638.80 respectively with costs and interest.

10. This is the Judgment appealed against.

11. The trial court is faulted for having erred in law and fact for:

    1. Failing to appreciate that the claim for overtime was unmerited in view of the minimum wage.

    2. Failing to appreciate the burden of proof on the respondent and misdirected itself.

    3. Failing to appreciate that parties are bound by their pleadings and the award of Kshs.279,568.80 yet the respondent pleaded for Kshs.61,174.00

    4. Failing to appreciate that this was an employment contract subject to the 3 years limitation period.

    5. Failing to appreciate that the appellant had discharged the burden of proof to have the suit dismissed.

    6. Failing to consider the appellant's submissions.

Appellant's submissions

12. On under payment, the appellant submitted that the claim for March to May 2018 was statute barred on account of Section 90 of the *Employment Act*.

13. That underpayment and overtime accrue at the end of the month.

14. Reliance was placed on the rendition of the Court in G4S Security Services (K) Ltd V Joseph Kamau & 48 Others [2018] eKLR, Bosire Ogero V Royal Media Services [2015] eKLR, and Owners of the Motor Vessel "Lillian S" V Caltex Oil (K) Ltd [1989] KLRI to urge that the claim was statute barred.

15. Counsel submitted that the claim for underpayment from March 2018 to January 2021 was not merited since the minimum wage was Kshs.13,572.00.

16. In overtime, the appellant submitted that overtime was included in the salary as per the contract. The decision in Samuel Chacha Mwita V Kenya Medical Research Institute [2014] eKLR was relied upon to reinforce the submission to urge that overtime was covered contractually.

Respondent's submissions

17. On underpayment, the respondent argued that having worked both day and night, he was entitled to the higher pay as held in Samwel Agwata Ogaro v Lavington Security.

18. That the appellants Code of Conduct provided for working hours 6am to 6pm (12 hours per day) and the appellant's witness confirmed as much and there was no evidence that overtime pay was consolidated.

19. Reliance was made on the sentiments of the court in Vipingo Ridge Ltd V Swalehe Ngoge Mpitta [2022] KEELRC 309 (KLR) and Charity Wambui Muriuki V M/s Total Security Surveillance Ltd [2017] eKLR on the meaning of consolidated to urge that overtime as awarded was proper.

20. Finally, reliance was placed on the decision in German School Society & another V Ohany & Another [2023] KECA 894 (KLR) on continuing injury to urge that the court was right to award claims beyond 3 years.

21. Being the 1st appeal the role of the court is as explained by the Court of appeal in Selle and Another V Associated Motor Boat Co. Ltd & Others [1968] IEA 123;

> "...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".
>
> 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 on some point to take into account of particular circumstances or probabilities materially to estimate the evidence"

22. The court expressed similar sentiments in Gitobu Imanyara & 2 Others V Attorney General [2016] eKLR, Peter M. Kariuki V Attorney General [2014] eKLR, Ngui V Republic [1984] KLR 729 and Susan Munyi V Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported) among others.

23. The six (6) grounds of appeal can be condensed into three namely; reliefs awarded by the court and limitation of action, burden of proof and submissions.

24. Concerning non-consideration of the appellant's submissions, the ground lacks any embellishment in the appellant's submissions and in any case the learned trail Magistrate addressed the issue of constructive dismissal and found that the respondent had not discharged the burden of proof and held that the respondent had voluntarily resigned from employment. The appellant addressed both issues covered in its submissions dated 24th January, 2023.

25. In the court's view, nothing turns on this ground.

26. On the burden of proof, the trial court found that the respondent had not proved entitlement to leave allowance and house allowance an account of the payslips availed as evidence and found that the claim for overtime was uncontroverted. I will revert to this issue shortly.

27. In resolving the issue of burden of proof it is trite law that he who alleges must prove the allegations.

28. Section 107 of the *Evidence Act* provides that: -

    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 exists.

    2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

29. Section 108 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

30. See Anne Wambui Ndiritu V Joseph Kiprono Ropkoi & Another [2005] IEA 334 and Alice Wanjiru Ruhiu V Messiac Assembly of Yahweh [2021] eKLR.

31. Needless to belabour, the standard of proof in civil cases is on a preponderance of probability. In other words, it must be more probable than improbable that the alleged event or state of affairs took place or existed. (See Ahmed Mohammed Noor V Abdi Aziz Osman [2019] eKLR).

32. The pertinent question is whether the appellant adduced sufficient evidence to prove that the respondents suit ought to have been dismissed.

33. The short answer to this question, in the court's view, is that it did not and the trial court was not faulted for having disregarded any particular piece of evidence other than the employment contract.

34. As regards underpayment, the trial court found that the respondent was underpaid from March 2018 to November 2018, December 2018 to December 2019 and January 2020 to March 2020 and the appellant had no controverting evidence.

35. The claimant testified that he worked from 6:00pm to 6:00am and was thus a night watchman.

36. The appellant did not provide any evidence to the contrary and the respondent ought to have been remunerated as a night watchman as per the Regulations of Wages Orders (General).

37. The respondent's uncontroverted testimony was that from 2017 to 2019 his salary was Khs.13,500 and in 2020 it was increased to Kshs.15,000.00.

38. Regrettably, the selected payslips availed by the appellant save for one or two have a variable allowance such as leave or public holiday, which are not regular allowances.

39. From the payslips, it is discernible that the respondent's salary in April 2020 was Kshs.15,668.53, which to some extent confirms his allegation evidence of Kshs.15,000 from 2020.

40. The minimum wage in May 2018 was Kshs.15,141.95 plus Kshs.2,271.30 house allowance, total Kshs.17,413.24.

41. Before May 2018, the minimum salary for a night watchman in Kisumu was Kshs.14,420.90 plus Kshs.2,163.04, house allowance, total Kshs.16,584.04.

42. Evidently, the respondent was underpaid throughout his employment by the appellant.

43. However, the respondent can only recover for underpayments for 36 months prior to the date of separation by dint of Section 89 of the *Employment Act* for the simple reason that the respondent applied for and signed a new contract of employment every other year and no dues were carried over including leave days.

44. Taking into account the respondent's salary from January 2018 to 2019 and the change in 2020 as his evidence reveals, and the operative Regulation of Wages Orders (General), the court is satisfied that the total amount recoverable for the 36 months for underpayment is Kshs.110,198.87.

45. The court is unsure how the sum of Kshs.279,638.80 awarded by the trial court was arrived at, including whether the change in the respondents salary in 2020 was taken into consideration.

46. Although the amount awarded by the trail court is not damages stricto sensu, the principle of non-interference with such an award unless the trial court acted on wrong principles, took into account a factor it ought not to have or failed to take into account a factor, applies, as held by the Court of Appeal in Kivati V Coastal Bottlers Ltd Civil Appeal No. 69 of 1984.

47. See also Ken Odondi & 2 Others V James Okoth Omburah t/a Okoth Omburah & Company Advocates Civil Appeal No. 84 of 2009, Mensah V Amakom Sawmill [1962] IELR 373.

48. In the instant case, the court is satisfied that a case of interference with the award for underpayment has been demonstrated.

49. As regards overtime, the trial court is faulted for failing to appreciate that the respondent had not discharged the burden of proof as to when he worked overtime and could not justify the sum of Kshs.61,174.40 pleaded.

50. The respondent's counsel submitted that the award was justified as the respondent worked overtime 4 hours every day and was not paid the sum of Kshs.79,901.60 for the entire duration.

51. Contrary to counsel's submission that the respondent resigned on 19th March, 2021, the letter on record which the respondent did not disown is unambiguous that he resigned on 28th January, 2021 and was grateful for the opportunity to serve as an employee of the appellant for 6 years and experience. He admits having enjoyed and requested the appellant to computate his dues.

52. The appellant on the other hand contended that the respondent's salary included overtime as per the Employment Contract.

53. Clause 8.1 of the respondent's employment contract dated 19th January, 2020 stated;

> The Company shall pay the employee a monthly salary of Kshs. and Kshs. house allowance, subject to such deductions as the Company may by law be required or permitted to make as provided hereunder.
>
> Please note that overtime pay has been included and consolidated in the salary based on a 12 hour work shift".

54. The respondent signed the employment contract on 29th January, 2020 and did not contest clause 8.1 of the employment contract or any other clause during the currency of his employment.

55. At common law signature prima facie means acceptance. The signature binds the signatory unless it is vitiated by a mistake, where the signatory can plead non est factum, or misrepresentation, duress or undue influence which render the signature voidable at the option of the signatory.

56. See Lestrange V Grancob [1934] 2KB 394.

> In the words of Scrutton L. J.
>
> When a document containing contractual terms is signed, then in the absence of fraud, or, I will and misrepresentation, the party signing it is bound and it is wholly immaterial whether he has read the document or not".
>
> Maugham L. J. concurred;
>
> There can be no dispute as to the soundness in law of the statement of Mellish L. J. in Parker V South Eastern Railway Co. Ltd 2 CPD 416 at 421, which has been read by my learned brother, to the effect that where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents.
>
> That is true in any case in which the agreement is held to be an agreement in writing".

57. See G.Percy Trentham V Archital Luxfer Ltd [1993] Illoyds Rep. 25 and RTS Flexible Systems Ltd V Molkerei Alois Mutter GmbH & Co. KG (UK production) 2010 UKSC 14 (45) cited by Oguto J in Mamta Peeush Mahanjan (suing on behalf of the Estate of the late Peeush Premlal Mahajan) V

Yashwant Kumari Mahajan (sued personally and as Executrix of the Estate and beneficiary of the Estate of the late Krishan Lai Mahajan [2017] eKLR.

58. Although these decisions are merely persuasive, they postulate the relevant common law principles on signed written contracts.

59. Having signed the Employment Contract, the respondent was bound by its terms and did not fault it in any respect.

60. In his judgment delivered on 26th July, 2023, the learned trial Magistrate stated that the claim for overtime was not controverted for the period March 2018 to November 2018 and December 2018 to March 2021 and awarded Kshs.79,901.60 as prayed for, which was based on the assumption that the respondent worked for 4 extra hours every day for the 37 months as claimed.

61. Clearly, the court did not take into consideration clause 8.1 of the respondent's employment contract or demonstrate why it was not applicable in the circumstances of this case.

62. Having found that the respondent was bound by the terms of the Employment Contract, and in particular clause 8.1, the court is satisfied that the claim for overtime was unsustainable and no award ought to have been made.

63. The foregoing finding is fortified by the sentiments of the Court of Appeal in Bell and Another V Mattereto Ltd [2022] KECA 168 KLR thus:

64. In Ephantus Mwangi & Another V Duncan Mwangi [1981 – 1988] 1 KAR 278, an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence (b) a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or a misapprehension of the evidence is the judge is the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did..."

65. In the instant case, the appellant has demonstrated a case for interference with the findings of the trial court in relation to the claim for overtime as the award was contrary to the express provisions of the employment contract which the respondent had duly executed on 29th January, 2020.

66. The upshot of the foregoing is that the appeal is partially successful as follows:

    a. The award of Kshs.79,901.60 as overtime is set aside.

    b. The award of Kshs.279,638.80 as underpayment is set aside and in its place an award of Kshs.110,198.87.

    c. The respondent is awarded 50% costs in the trial court.

    Parties shall bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 31ST DAY OF MARCH, 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.