



Luka v Kanti Laxman Vanga t/a New Chetna Restaurant (Employment and Labour Relations Appeal E107 of 2024) [2025] KEELRC 1167 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1167 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E107 OF 2024**

K OCHARO, J

APRIL 24, 2025

BETWEEN

MWEMBE LUKA APPELLANT

AND

**KANTI LAXMAN VANGA T/A NEW CHETNA
RESTAURANT RESPONDENT**

(Being an appeal against the judgment of the Senior Principal Magistrate – Hon L.N. Wasige delivered on 5th October 2024 in Mombasa MCELRC No. E 0689 of 2021)

JUDGMENT

Introduction

1. Contending that at all material times he was an employee of the Respondent, who resigned from the latter’s employment after serving him for almost 30 years, but wasn’t paid terminal dues unjustifiably and unfairly, the Appellant sued the Respondent in the above-stated suit, seeking various reliefs. The Respondent filed a reply to his claim, denying his cause of action and entitlement to the reliefs sought. The suit was heard on merit, and on the 5th October 2023, by his judgment, the Learned trial Magistrate dismissed the same.
2. Aggrieved by the judgment, the Appellant filed the appeal herein, assailing the judgment upon the premise of five grounds of appeal as set out in the Memorandum of Appeal dated 11th October 2023.
3. When this matter came up before this Court for directions on the hearing of the appeal, I directed that the appeal be canvassed by way of written submissions. The direction was complied with. The parties’ respective submissions are on record.



The Appellant's case before the Lower Court.

4. The Appellant asserted that he first joined the Respondent's workforce in 1991 as a cook at a monthly rate. His terms and conditions of employment were not reduced to any written contract at any time during his employment.
5. In August 2020, he issued a 30-day resignation notice after serving the Respondent for 30 years. At the time of his resignation, he was earning a monthly salary of KShs. 15,000.
6. At the point of resignation, he requested the Respondent to tabulate and pay his terminal dues, including earned but unutilised leave days, holiday pay, and a certificate of service. The Respondent didn't tabulate or pay.
7. During his employment, he was only allowed to proceed for annual leaves of 24 days instead of 30 days; he would work during public holidays, but without compensation for the same; and he worked beyond the stipulated/agreed 8 hours per day by approximately 4 hours, as he could work from 6 am to 6 pm per day, six days a week, without compensation.
8. He claimed that he was grossly underpaid during his time of employment.
9. He asserted that in the premises of his case, he was entitled to the following;

Description	Amount (Kshs)
Service Pay	14,400.00
Unpaid leave	90,000.00
Overtime	1,968,750.00
Public Holidays pay	303,000.00

The Respondent's case before the Lower Court.

10. The Respondent admitted that the Appellant was his employee as a cook for approximately 30 years. He earned a monthly salary of KShs. 15,000 from 1991 up to 2019 and KShs. 18,000 from 2019 up to the time of his resignation.
11. The Appellant, at all material times, took his annual leave for 21 days, which amounted to $\frac{3}{4}$ days per month for each completed calendar year of service as prescribed under Section 28 of the [Employment Act](#). He received double his salary for all public holidays worked, as stipulated by law, and was compensated for overtime whenever he worked for more than 8 hours.
12. The Appellant was paid all his terminal dues upon his issuing 30 days' notice.

The Lower Court's Judgment.

13. After hearing the parties on their respective cases, and considering their evidence, the Learned Trial Magistrate rendered judgment, holding that the Appellant had failed to prove his case and as such, he was not entitled to any of the reliefs embodied in his pleadings. Consequently, he dismissed the Appellant's claim with costs.



The Appeal.

14. Aggrieved by the judgment, the Appellant filed the instant appeal, setting forth the following grounds;
 - a. The Learned Trial Magistrate erred in arriving at a judgment that was against the weight of the evidence on record.
 - b. The Learned Trial Magistrate erred in fact and law in shifting the burden of proof to the Appellant.
 - c. The Learned Trial Magistrate erred in fact in holding that the Appellant had not adduced evidence proving overtime and holidays worked.
 - d. The Learned Trial Magistrate erred in law and fact in writing a judgment against a party incapable of being sued.
 - e. The Learned Trial Magistrate erred in law and fact in disregarding a claim for service pay and misinterpreted and wholly disregarded settled stare decisis.

The Appellant's Submissions.

15. Arguing on the first ground, Counsel for the Appellant submitted that the trial Court erroneously and to the prejudice of the Appellant mischaracterised his case when he found that the Appellant had stated in his testimony that he was working overtime and during public holidays but was not being paid, yet his evidence was to the effect that he worked through all public holidays but would only be get paid the equivalent of 1 day's work and not double pay as per law required. On the issue of overtime, the clear testimony of the Appellant was that he was claiming one hour of overtime per day.
16. The Learned trial Magistrate failed to appreciate that in an employer-employee relationship, all records are under the custody of the employer. With the Appellant's clear testimony, the burden of proof shifted to the Respondent to disprove the assertions through documentary evidence /records kept in line with section 74 of the *Employment Act*. To support these submissions, reliance was placed on the decision in Joseph Omollo v Board of Management Kisumu Boys High School, Kisumu, Elrc Cause No. 181 of 2015.
17. The Appellant claimed that he worked for 8 hours a day without breaking for lunch. Therefore, his claim was for one hour of overtime worked each day for 3 years. The Respondent admitted in his evidence under cross-examination that he didn't have a record to discount the appellant's claim. Mere assertion that the Appellant was paid whenever he worked overtime couldn't suffice to dislodge the Appellant's claim.
18. On service pay, Counsel submitted that it is a benefit for an employee who has not enjoyed the benefit of statutory deductions as provided under sections 35[5] and [6] of the *Employment Act*. The Respondent failed to demonstrate compliance with the statutory requirements to deduct and remit the applicable dues. The Appellant's statement of account with the NSSF clearly shows that while he was a member, the Respondent did not dutifully make monthly remittances. Remittances were not made for six years. The Magistrate misdirected himself when he found that the Appellant was not entitled to service pay.
19. The learned Magistrate entered Judgment against Chetna Restaurant, an entity which wasn't sued by the Appellant. As such, the Judgment of the trial Court should be reversed wholly.



The Respondent's Submissions.

20. Counsel for the Respondent submitted that the sole issue for determination in this appeal is whether the Trial Magistrate can be faulted for failing to award the Appellant the terminal dues as prayed for in his Memorandum of Claim, to warrant setting aside the trial Court's Judgment.
21. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* dictates so. The Appellant didn't adduce sufficient evidence on a balance of probabilities to prove his entitlement to the reliefs sought. He asserted that he worked overtime and during public holidays, without supporting the allegation with sufficient evidence. Therefore, the Learned Magistrate didn't err in concluding that he was not entitled to any compensation under the head.
22. The duty to prove that the Appellant worked overtime lay on the Appellant and not the Respondent. To buttress this point, reliance was placed on the case of Patrick Limimba Kimuyu v Prime Fuels [K]Limited [2018] eKLR and Ragoli Ole Monadiagi v General Cargo Services [2016] eKLR.
23. The Appellant failed to put forth the Master rolls for 2018, 2019, and 2020. However, the Respondent did tender them as evidence. A cursory look at the reveals that the Appellant was paid for overtime and for each public holiday worked.
24. On service pay, it was submitted that the Appellant was a registered member of the National Social Security Fund, and this fact cannot be disputed. The statements of account tendered show that the Respondent dutifully made monthly contributions on the Appellant's account. Section 35[5] of the *Employment Act* limits the payment of service pay to persons who are not members of a registered pension scheme or provident fund, a service pay scheme established under a collective Bargaining agreement or any other scheme. The Respondent cited the Board of Management of Ng'araria Girls Secondary School v Kudheihia Workers [2017] eKLR to fortify this point.
25. In the event an employer doesn't deduct and remit deductions to the Fund, the NSSF Board is mandated by the law to collect the funds from the defaulting employer, prosecute them, and charge interest and penalties against them, as well as file suits for recovery of the defaulted sums. To fortify these submissions, the case of Cook 'N' Lite Limited v Petrick Karani [2023] KEELRC 2387[KLR] was cited.
26. The Learned Trial Magistrate didn't err by declining to award the relief, service pay.

Analysis and Determination

27. I have carefully considered the sixteen grounds set out in the Memorandum of Appeal, the material that was placed before the Learned Trial Magistrate, and the submissions by the parties herein, and conclude that the appeal herein revolves around one principal ground, thus:
 - a. Did the Learned Trial Magistrate err in dismissing the Appellant's claim in its totality?
28. Before I delve further into considering the issue, it is crucial to appreciate the role of this Court as a first Appellate Court regarding this controversy between the Appellant and the Respondent. It is established law that a first appellate court must re-evaluate and analyze the material presented before the trial court by the parties, and formulate its conclusions on the issues in controversy, without being necessarily bound by those of the trial court. However, in so doing, it must sound a caution to itself that it neither saw nor heard the parties testify and thus give due allowance. Where it departs from the findings of the trial Court, clear reasons thereof must be given.



29. With the scope in mind, I will consider every relief the Appellant sought before the trial Court, the Parties' respective pleadings and evidence as they related to each of them and draw this court's conclusions.
30. The Appellant asserted before the trial Court that throughout his employment with the Respondent, the latter allowed him to enjoy his right to annual leave only to an extent of 24 days each calendar year instead of 30 days.
31. Under section 28 of the [Employment Act](#), 2007, annual leave is a statutory right to be enjoyed by the employee, and it follows therefore that there is a corresponding statutory duty on the part of the employer to facilitate and allow the enjoyment. The section specifically provides that an employee is entitled to at least 21 working days of leave with full pay after every 12 consecutive months of service.
32. The Respondent asserted that in the discharge of its statutory duty hereinabove mentioned, it religiously facilitated and allowed the Appellant to enjoy his right to annual leave, each calendar year, 21 days of paid leave. I have carefully considered the Appellant's evidence in support of his claim under this head. It doesn't explain why 24 days instead of the statutory minimum of 21 days. Was it that a contractual term was provided for it? Was there a workplace practice from which the entitlement would be deduced? In the absence of evidence as to why, I am not persuaded that the learned Magistrate erred in declining to grant the relief.
33. Section 35 [5] of the [Employment Act](#) excludes a category of employees from the benefit of service pay, including members of the National Social Security Fund. The section provides.
34. It is not in dispute that the Appellant was a member of the Fund. The Appellant contended that though he was, the Respondent would not remit the deducted sums from his salary, and its portion as an employer, dutifully, as and when he was supposed to. As Counsel for the Respondent correctly submitted, remittances to the Fund are regulated explicitly under an Act of Parliament, the [National Social Security Fund Act](#). It provides consequences in the event that the employer defaults on making the remittances.
35. Section 14 provides;

“If any contributions for which a contributing employer is liable under this Act is not paid within one month after the end of the month in which the contribution period or the last day of the contribution period to which it relates falls, a sum equal to five per cent of the amount of the amount of that contribution shall be added to the contribution for each month or part of a month thereafter that the amount due remains unpaid, and any such additional amount shall be recoverable in the same manner as the contribution to which it is added.”
36. Undoubtedly, the Act has provided a compensatory mechanism and formula to compute damages for an employee who has suffered prejudice as a result of their employer's default in discharging its obligation in making the statutory remittances. As such, it cannot be the business of a court to fashion another remedy for the employee outside of what is provided in statute and the prescribed mechanism.
37. The fact that the Respondent didn't make all remittances to the Fund as expected of him, couldn't be a sufficient factor to remove the Appellant from the brackets of those that the law has excluded from the benefit of service pay, to the pedestal of those entitled to it. Therefore, the Learned Trial Court didn't err when it declined to grant the relief.



38. The relief for overtime compensation was sought uncertainly. In paragraph 8[c] of the statement of claim, the Appellant stated;

“.....Worked beyond the Stipulated/agreed 8 hours per day, to approximately 4 hours of overtime [6 am to 6 pm] per day, six [6] days a week, and was not compensated for it.

Here, it is glaringly apparent that the Appellant was claiming that he was working four [4] hours of overtime per day at all material times.

39. In paragraph 9 of his witness statement dated 15th October 2021 [turned evidence in chief before the trial Court], the Appellant states;

“During my Employment, I:

I. Never proceeded on full statutory Leave and/or observed any public Holidays as stipulated by law;

II. Worked beyond the stipulated /agreed 8 hours per day, to approximately 4 hours of overtime [7 am to 7 pm] per day, seven days a week, and was not compensated for it.

This Court notes that in his witness statement, the Appellant maintains that he worked 4 hours of overtime daily, but changes the start and exit hours daily.

40. In his submissions, Counsel for the Appellant argues that the Appellant’s claim for overtime was compensation for one hour of overtime per day, a radical departure from what is embodied in the statement of claim and witness statement [turned evidence in chief].

41. With this uncertainly presented material, no court of law exercising fairness and justice would grant the relief.

42. I have carefully considered the individual master roles presented in evidence by the Respondent for the various years and note that they all include an item of overtime and indicate that the Appellant was paid at all material times. Further, the Appellant didn’t sufficiently discount this evidence, considering that his signature appears on the documents.

43. From the pleadings and the evidence placed before the trial Court, in my view, the claim for compensation for holidays worked but not paid for was presented with specificity and clarity. One cannot tell which holidays, as there can be many and not uniform for each year. The claim was just thrown to the Court.

44. A certificate of service is a statutory right for any employee who has exited employment, the circumstances of exit notwithstanding. The Respondent should issue one to the Appellant within 30 days of today.

45. By reason of the foregoing, I am not persuaded that the Appellant’s appeal herein has merit. It is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF APRIL, 2025.

OCHARO KEBIRA

JUDGE.

