



**Hatari Security Guards Limited v Oduor (Appeal E043 of 2024)
[2025] KEELRC 1112 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1112 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E043 OF 2024
NZIOKI WA MAKAU, J
APRIL 3, 2025**

BETWEEN

HATARI SECURITY GUARDS LIMITED APPELLANT

AND

DANIEL ODUOR RESPONDENT

*(Being an appeal from the judgment and decree of Hon. F. Rashid (PM)
in KISUMU CMELRC NO. E167 OF 2023 delivered on 6th August 2023)*

JUDGMENT

1. On 6th August 2024, the Learned Magistrate delivered a judgment in favour of the Respondent, partially upholding his claim and awarding him a total of Kshs. 943,555/-. This amount accounted for underpayments, house allowance, overtime, rest days, gratuity, and leave days. Dissatisfied with the judgment, the Appellant lodged a memorandum of appeal with the court on 29th August 2024 contending that:
 1. The Learned Magistrate erred in law and in fact by holding that the Respondent was entitled to be paid for rest days not taken at Kshs. 106,715/- notwithstanding;
 - i. The evidence submitted by the Appellant demonstrating that the Respondent got a day off every week; the same was not challenged in any material way.
 2. The Learned Magistrate erred in law and in fact by holding that the Respondent was entitled to be paid gratuity at Kshs. 117,017/- notwithstanding;
 - i. The finding by the trial court that the Respondent willingly resigned from employment; and



- ii. The provisions of Regulation 17(2) of the Regulation of Wages (Protective Security Services) Order, 1998 which expressly provides that an employee who terminates his services for any reason other than certified ill-health or retirement age shall not be entitled to gratuity.
 3. The Learned Magistrate erred in law and in fact by awarding the Respondent leave pay at Kshs. 39,006/- notwithstanding:
 - i. The evidence submitted by the Appellant demonstrating that the Respondent was already paid Kshs. 14,030/- before filing his suit; and
 - ii. The admission by the Respondent that he was indeed paid Kshs. 14,030/- by the Appellant before he instituted suit.
 4. That the Learned Magistrate erred in law in awarding costs to the Respondent devoid of any demand letter issued to the Appellant.
2. Consequently, the Appellant sought to have the awards for rest days, gratuity, and leave days set aside, along with the costs of the suit. It also requested that the costs of the appeal be awarded in its favour. On 11th September 2024, the Learned Magistrate ordered the Appellant to deposit the decretal amount in a joint interest earning account in the names of both counsel on record. This was set as a precondition for granting stay of execution pending appeal.
3. Subsequently, on 4th February 2024, this court adopted a consent dated 22nd January 2025, resolving part of the dispute. It was agreed that the awards for overtime, underpayment, and house allowance— totalling Kshs. 797,834/- would be distributed as follows:
- a. Kshs. 534,308.73/- to the firm of P.D Onyango & Co. Advocates for the respondent.
 - b. Kshs. 263,525.27/- in statutory deductions comprising PAYE, SHIF, NSSF and Housing Levy to the firm of GNK & Associates LLP for the Appellant.
4. Moreover, the Appellant was required to file proof of remittance of these statutory deductions to the relevant bodies within 30 days of the funds' release. Failure to comply would result in the unremitted balance being reimbursed to the Respondent.
5. Directions regarding the appeal's disposal were given on 28th October 2024. The Appellant filed submissions on 22nd November 2024 while the Respondent filed submissions on 18th February 2025.

Appellant's Submissions

6. The Appellant submits that the Learned Magistrate erred in awarding the Respondent Kshs. 106,715/- for rest days, Kshs. 117,017/- in gratuity, and Kshs. 39,006/- in leave pay. Regarding rest days, the Appellant submits that the Magistrate disregarded its unchallenged evidence. It asserts that it is implausible the Respondent would have worked 7 days a week for an entire year without a break. To support this claim, the Appellant refers to work tickets from October and November 2022, which indicate that the Respondent had four rest days per month and was usually relieved by Mr. Micheal Ochola. Additionally, the Appellant relies on the case of *Mburu v Gillys Security Investigations Services Ltd* [2024] KEELRC 1348 (KLR), where the court held:

“It is inconceivable that the Claimant worked 7 days a week meaning he worked 365 days in a year. Since the abolition of slavery, it is not conceivable that a person can be at work every



day without a break year after year without any protest. As such the claim is found to be fallacious and disallowed.”

7. On gratuity, the Appellant submits that it is only payable in cases of employment termination due to ill health or retirement. It asserts that the Respondent is not entitled to gratuity, as he voluntarily retired. The Appellant relies on Regulation 17(2) of the Regulation of Wages (Protective Security Services) Order, 1998, which mandates gratuity payment solely in instances of termination due to ill health or retirement. Further, it cites *Fidelis Mwanyumba v Total Security Surveillance* [2015] KEELRC 1099 (KLR), where the court emphasized that gratuity is only awardable in case of ill-health or retirement in line with Regulation 17(2). In addition, the Appellant highlights the Respondent’s admission that the Appellant contributed to the National Social Security Fund (NSSF), disqualifying him from gratuity under section 35(6) of the *Employment Act*.
8. Regarding leave pay, the Appellant submits that the trial court overlooked a prior payment of Kshs. 14,030/- to the Respondent. It references a petty cash voucher dated 9th January 2021 and bank transaction excerpts dated 5th April 2023 and 19th January 2021 as proof of this payment. On costs, the Appellant asserts that an award was unwarranted, as the Respondent failed to issue a demand letter before instituting the suit. In conclusion, the Appellant urges the court to set aside the trial court’s judgement.

Respondent’s Submissions

9. The Respondent submits that he was rightfully awarded half the costs of the suit, emphasizing that the Magistrate properly exercised her discretion based on his partial success. He further asserts that a demand letter was served, though it lacked a received stamp, just like his resignation letter. He maintains that he sought payment before filing the suit, citing his resignation letter dated 14th June 2023 and the letter from the union dated 22nd May 2023, both of which demanded dues. To support his claim for costs, he relies on *Joseph Oduor Anode v Kenya Red Cross Society* (Civil Suit No 66 of 2009) 2012 KEHC 3607 (KLR) (28th June 2012) (Ruling), where the court affirmed that awarding costs is discretionary but should generally follow the outcome unless justified otherwise.
10. Regarding rest days, the Respondent submits that the award was justified. He notes that despite a notice to produce, the Appellant failed to present the OB, the only record that could confirm his absence from work. Additionally, he affirms that the alleged reliever was never called to give testimony. On leave days, he submits that he is entitled to Kshs. 24,976/- after deducting Kshs. 14,030/- from the Kshs. 39,009/- awarded by the Magistrate. In conclusion he urges the court to dismiss the appeal with costs.
11. This being a first appeal to this Court, I comprehend it to be an appeal on both facts and the law. As the first appellate court, I am duty bound to revisit and exhaustively re-evaluate the evidence presented before the trial court to arrive at my own independent conclusions all the while bearing in mind that unlike the trial court, I did not have the advantage of seeing and hearing the witnesses testify and give due allowance for that disadvantage. For reference is the celebrated case of *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123. I therefore have reviewed the pleadings and evidence adduced herein and have come to the determination of the Appeal as follows.
12. The Appeal was compromised to a certain degree thus limiting the balance of issues for determination in this Appeal to solely the following matters:-
 - a. rest days,
 - b. gratuity,



- c. leave days
 - d. costs of the suit.
13. The very first issue is rest days and the Appellant asserts the Respondent had 4 off days a month. It is asserted further that the Respondent's reliever was Mr. Micheal Ochola for the times the Respondent went off. Whereas the Appellant asserts the Respondent was given leave days, the Appellant as employer had the burden to avail employment records. The Appellant did not avail the record – OB which recorded the days the Respondent attended for duty. No duty roster was availed and the only record availed in respect of rest was the Appellant's leave approval for leave undertaken in 2020. The Appellant was the employer and leave records are in the custody of an employer who complies with section 74 of the *Employment Act*. In the case before the Learned Magistrate, the Appellant did not avail any additional records. That would have dispelled any lingering doubts as to when the Respondent reported for work and the leave he took. In the absence of any contrary evidence and given the determination which was weighed and measured, I will not disturb the findings by the Learned Magistrate in relation to this aspect of the Appeal.
14. The second is the issue of gratuity. The question of gratuity is one that is easy to resolve. The Respondent did not fall in any of the categories where gratuity would be payable. As such the award of gratuity is set aside in its entirety. The Regulation of Wages Order (Protective Security Services) (Amendment) Orders do not make provision for gratuity at any level of the protective services. In this case there would have been no basis to award the same and I hold that the Learned Magistrate fell in error in doing so.
15. On costs, the Learned Magistrate was required to consider various factors before awarding costs. She did not grant the Respondent the entire costs of the claim meaning she applied her mind to the matter and out of the discretion she exercised on the matter decided the Respondent was entitled to half of the costs. In the Court's considered view, the Learned Magistrate did not fall into error in the award of costs and this award is not disturbed.
16. As the Appellant has only succeeded in having the sum awarded in gratuity set aside, the Appeal will only be allowed to that extent. Since this is a very minor and insignificant relief from the decree and judgment of the Learned Magistrate and considering that a substantial aspect of the Appeal was resolved by the parties, there shall be no order as to costs on the appeal, meaning each party will bear their own costs for the Appeal.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF APRIL 2025

NZIOKI WA MAKAU, MCI Arb.

JUDGE

