



Omuyonga v Fast Security Services Limited (Employment and Labour Relations Appeal E137 of 2023) [2025] KEELRC 1513 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1513 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E137 OF 2023**

**JW KELI, J
MAY 23, 2025**

BETWEEN

MOSES OMWAKA OMUYONGA APPELLANT

AND

FAST SECURITY SERVICES LIMITED RESPONDENT

(Being an Appeal from the Judgment and Orders of the Honourable C.A. Mayamba (SPM) delivered at Nairobi on the 23rd of June, 2023 in MCELRC No. 315 of 2022)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable C. A. Mayamba (SPM) delivered at Nairobi on the 23rd of June, 2023 in Nairobi MCELRC Cause No. E315 of 2022 between the parties filed a memorandum of appeal dated 22nd day of July 2023 seeking the following orders:-
 - a. The trial court's entire judgment be set aside and in its place judgment be entered in line with the memorandum of claim as follows:
 - i. A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious, unprocedural and an infringement on his constitutional rights.
 - ii. Maximum compensation for wrongful dismissal.
 - iii. Special damages:
 - I. One month's pay in, lieu of Notice Kshs. 17,413.25
 - II. Damages for wrongful dismissal Kshs.208,959.00



- III. Amounts for leave not taken Kshs. 52,239.00
 - IV. Underpayment Kshs.236,486.00
 - V. House Allowance Kshs.104,466.00
 - VI. Overtime Kshs.753,756.00
 - VII. Rest Days Kshs.546,200.00
 - VIII. Public Holidays Kshs.125,472.00
 - IX. Unremitted NSSF Deductions Kshs. 32,000.00
 - X. Service Gratuity Kshs. 54,000.00
- iv. Interest on the total.
 - v. Certificate of Service.
 - vi. Costs of the Cause.
 - vii. Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.

Grounds of the Appeal

2. That the Honourable Trial Magistrate erred in law and in fact by failing to consider the concept of constructive dismissal.
3. That the Honourable Trial Magistrate failed to appreciate the circumstances leading to the resignation and the wordings of the resignation letter.
4. That the Honourable Trial Magistrate erred in making a finding that the Claimant's wage was consolidated when evidence showed the wage was below the basic minimum wage.
5. That the Honourable Trial Magistrate failed to consider Section 31 of the *Employment Act* as read together with Regulation 5 of the Regulation of Wages protective security services with regard to the issue of house allowance.
6. That the Honourable Trial Magistrate failed to consider Section 27 of the *Employment Act* as read together with Regulation 6 and 7 of the Regulation of Wages protective security services with regard to the issue of overtime.
7. That the Honourable Trial Magistrate failed to consider Section 27 of the *Employment Act* as read together with Regulation 9 of the Regulation of Wages protective security services with regard to working on public holidays.
8. That the Honourable Trial Magistrate failed to consider Regulation 8 of the Regulation of Wages protective security services with regard to rest days.
9. That the Honourable Trial Magistrate failed to consider Section 28 of the *Employment Act* as read together with Regulation 10 of the Regulation of Wages protective security services with regard to the issue of annual leave.
10. That the Honourable Trial Magistrate failed to consider the Claimant's authorities and submissions touching on the issue of redundancy thereby arriving at a wrong conclusion in law.



11. That the Honourable Trial Magistrate failed to consider Section 48 (1) (a) and (b) of the *Labour Institutions Act* thereby leading to an error whose effect was dismissal of the Claimant's special damages
12. That the Honourable Trial Magistrate failed to consider the provisions of Section 10 (7) and Section 74 of the *Employment Act* and placed an unjustified burden of proof on the Claimant.
13. That the Honourable Trial Magistrate failed to consider the minimum wage order with regard to basic minimum wage thereby wrongfully dismissing the Claimant's prayer for underpayments.
14. That the Honourable Trial Magistrate failed to consider the provisions of Regulation 17 of the Regulation of Wages protective security services thereby denying the Claimant's service gratuity.
15. That the Honourable Trial Magistrate generally failed to consider the provisions of the Regulation of Wages protective security services as submitted by the Claimants.
16. That the Honourable Trial Magistrate failed to consider the Claimant's submissions resulting in an irreversible error.
17. That the Honourable Trial Magistrate erred in law by failing to properly apply the law to the facts thereby resulting in the dismissal of the suit.

Background to the Appeal

18. The Appellant filed a claim against the Respondent vide a memorandum of claim dated 15th September 2021 seeking the following orders:-
 - i. A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious, unprocedural and an infringement on his constitutional rights.
 - ii. Maximum compensation for wrongful dismissal.
 - iii. Special damages:
 - I. One month's pay in lieu of Notice Kshs. 17,413.25
 - II. Damages for wrongful dismissal Kshs.208,959.00
 - III. Amounts for leave not taken Kshs. 52,239.00
 - IV. Underpayment Kshs.236,486.00
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 - VIII. Public Holidays Kshs.125,472.00
 - IX. Unremitted NSSF Deductions Kshs. 32,000.00
 - X. Service Gratuity Kshs. 54,000.00
 - iv. Interest on the total.
 - v. Certificate of Service.
 - vi. Costs of the Cause.



- vii. Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.
19. The Appellant filed his verifying affidavit, his witness statement, list of witnesses and list of documents all dated 15th September 2021 (see pages 24-45 of the ROA dated 3rd October 2024).
20. The claim was opposed by the Respondent who entered appearance and filed a Statement of Defence dated 18th May 2022 (pages 46-47 of ROA); list of witnesses (missing from ROA); witness statement (missing from ROA); and produced as its documents employment records (pages 48-73 of ROA).
21. The Claimant's/Appellant's case was heard on the 24th of May 2023 where the claimant testified in the case, produced his documents, and was cross-examined by counsel for the Respondent Mr. Wainaina (pages 106-108 of ROA).
22. The Respondent's case was heard on the same date where RW1, Richard Mwita, relied on his filed witness statement and produced the Respondent's documents. He was cross-examined by counsel for the claimant Mr. Wetaba (pages 109-110 of ROA).
23. The parties took directions on the filing of written submissions after the hearing. The parties complied.
24. The Trial Magistrate Court delivered its judgment on the 23rd of June 2023 where it dismissed the Claimant/Appellant's case. (Judgment at pages 111 – 114 of ROA).

Determination

25. The appeal was canvassed by way of written submissions. Both parties filed.
26. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-
“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 allowance in this respect. In particular the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
27. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94: “I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

Issues for determination

28. The appellant submitted that he had abandoned grounds 1 and 2 of the appeal and would not contest the trial court's finding on the termination of employment and proceeded to submit on the rest of the grounds of appeal which related to the reliefs sought in the claim.
29. The respondent submitted on the same issues as the appellant.



30. The court then found the issue to address in the appeal is whether the reliefs sought in the claim were merited.

Appellant's submissions

Ground 3 and 12 on the Issue of Consolidation of Wages

31. At pages 114 of the record of appeal the trial court makes the following finding:-House allowance, I do agree with the respondents advocate that the same can be consolidated in the basic pay of which in this case the claimant did not raise any issue. This position is respectfully erroneous from the trial court and it is clear that the claimants submissions were not considered(claimant's submissions at pages 75-93 of the record of appeal) At line 20 of page 75(ROA) the claimant introduced the provisions of section 48 of the *Labour Institutions Act* that incorporates the minimum wage orders and the wage regulations to the employees' contract clearly a departure from the argument of consolidation; At pages 76 to 80(ROA) the claimant took the court through the law applicable and the wage regulations being regulation of wages at paragraphs/regulation 3, 5, 7, 8 and 9 and the assertion that we did not dispute consolidation is entirely wrong. The pleadings are clear that the claimant's basic salary was supposed to be Kenya Shillings 15,141.95 which at the best the respondent was paying 13,000 from their own evidence and clearly an underpayment.. Consolidation of wages is also a contractual aspect and in the absence of a contract how does the court arrive at the finding that the wage was consolidated without proof. Section 48 (1) (b)clearly shows that the minimum wage orders and the wage regulations are part and parcel of a security guards contract and hence ought to be considered when arriving at a determination of a security guards wage and terms of service.
32. The Wages Order to constitute minimum terms of conditions of employment
- (1) Notwithstanding anything contained in this Act or any other written law-
 - (a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement:
 - (b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.
 - (2) An employer who fails to-
 - (a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or
 - (b) provide an employee with the conditions of employment prescribed in the order, commits an offence.
 - (3) If an employer is found guilty of an offence under subsection (2), the court may in addition to any other penalty order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid."



33. The appellant further relied on regulation 5 of the wage regulations that provides;. ‘Regulation 3: Basic Minimum Wage

i. Basic minimum wage

- (1) No person to whom this Order applies shall be employed at a basic minimum wage less favourable to him than that which is applicable to him under the First Schedule having regard to his occupation and the area of employment.
- (2) An employee shall be issued on pay day with a pay slip indicating all earnings due to him and deductions made therefrom in respect of any matter.” No pay slip was issued but still the trial court found in the respondents favour, notwithstanding their failure to issue an itemised pay statement as provided for by law. The court in *Matoke v Suchak (Appeal E046 of 2022)* [2023] KEELRC 2993 (KLR) (5 October 2023) (Judgment); In the case before the trial court, the Respondent failed to reduce the contract of service between the parties into writing despite the fact that the contract had been in force for a period that exceeded two years. From the record, it is clear that the dispute between the parties related to whether the Appellant’s: accrued leave; public holiday pay; overtime; salary arrears; and house allowance had been settled. In terms of the legal position expounded above, the burden lay with the Respondent to provide the trial court with evidence to show that the Appellant was not entitled to the various terminal dues that she had claimed. The court in *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* noted;The Respondent having failed to reduce the contract between the parties into writing, the burden rested on her to disprove the Appellant’s claim that she was subjected to overtime. The Respondent did not lead evidence in discharge of this burden.

Ground 4 on House Allowance

34. The trial court made a finding that the claimant’s salary was consolidated in terms of house allowance and basic pay and we raise this appeal aggrieved by the finding and the reasoning behind the finding. At page 109 (ROA)the respondents witness testifies as follows under cross examination; He was earning Ksh. 13,000. I have documents in our garage. I know the minimum wage but he agreed on the pay. The salary was inclusive of house allowance. We did not make a contract with him in writing. Without a written contract and notwithstanding the rights enshrined in the Act and wage regulations how did the court arrive at the conclusion that the wage was consolidated? The provisions of Section 31 of the *Employment Act* was the foundation of the claim before the court and read together with regulation 5 of the regulation of wages it is clear that house allowance is 15% of basic minimum wage that at the time stood at Kenya Shillings 15,141.95. If the wage is below the basic minimum wage and house allowance is 15% of the basic minimum wage then how do we arrive at the conclusion that the wage was consolidated and hence the claimant is undeserving of housing allowance. The court in *Matoke v Suchak (Appeal E046 of 2022)* [2023] KEELRC 2393 (KLR) (5 October 2023) (Judgment) held;”The claim for house allowance is also awarded considering that the appellant was neither housed by the respondent nor was he paid house allowance as required by section 31 of the Act. Provision of reasonable housing to an employee is not only recognized under the Act but also Article 41 and 43 of *the constitution*. Therefore, I award him house allowance at the rate of 15% of the basic pay of kshs. 30,000 which equals to Kshs.4500 per month for the sixty- six (66) months he served before termination being Kshs. 297,000.”The appellant relied on section 31 of the *Employment Act* and the relevant wage regulations and Regulation 5(Wages Order : “House Allowance .An employee who is provided with free housing accommodation by his employer shall, in addition to his basic minimum



wage, be paid housing allowance of one thousand shillings per month or fifteen per cent of his basic minimum monthly wage, whichever is higher.”

Ground 5 Overtime

35. The trial court held as follows at page 114(ROA);”I do not therefore agree with the claimant together with issues of overtime and rest days since there was no evidence to confirm he actually worked during public holidays.” At page 110(ROA) the respondents witness testifies as follows; In the occurrence book the time for reporting to work is indicated therein. I don’t know that a security should work for 52 hours a week. At page 108 of the record is the claimant’s evidence on cross examination where he states; I was working overtime but then same was not being indicated. I was working from 6 am to 6 pm. In his statement as filed in court the claimant testifies that; I would report to work at 6.00 pm and leave at 6.00 am and I was never compensated for the overtime.The appellant urged the court to go through the record and ascertain what alternative timelines were given by the respondent as to discredit the evidence offered by the claimant. Was there credible evidence to dispute that the claimant a security guard was working 12 hours a day which he urged the court to take judicial notice of the obvious and standard working hours for security guards. The law is clear on documentation and production of Employment records and punishing the employee to the advantage of the employer over responsibility by law placed on the employer is respectfully miscarriage of justice and we pray that this court rectifies that. Section 110(7) and 74 are clear as we will demonstrate when we tackle the burden of proof. The trial court did not give reasons as to why the claimants evidence was disregarded and on the strength of the responsibilities placed on the employer and equally on the strength of the employer’s difficulty in availing the claimants working hours the decision to deny the claimant overtime is one that is ripe for reversal and granting as prayed in the memorandum of claim. Section 27 *Employment Act* on working hours ‘27. Hours of work (1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.” Regulation 6: Hours of Work-The normal working week of all employees including day and night guards shall be fifty two hours of work spread over six days of the week.. Regulation 7: Overtime-(1) An employee who works for any time in excess of the normal hours of work specified in paragraph 6 shall be entitled to be paid for the overtime thereby worked at the following rates-

- (a) one-and-a half times his normal rate of wages per hour in respect of any time worked in excess of the normal hours of work;
- (b) twice the normal rate of wages per hour in respect of any time worked on a rest day” The court in *AA v SGA Security Solutions Limited* (Employment and Labour Relations Appeal E002 of 2022) [2022] KEELRC 1553 (KLR) (29 July 2022) (Judgment) in the absence of evidence by the Respondent to the contrary in terms of section 10(7) of the *Employment Act* and based on the above finding, I will set aside the trial court’s finding on this item and replace it with a finding that there is evidence establishing a prima facie case that the Appellant was subjected to regular four (4) hours overtime for the duration of the contract. In the absence of rebuttal evidence as required under section 10(7) of the *Employment Act*. I award the Appellant overtime pay of Ksh. 551,480/= being the amount claimed based on four (4) hour overtime rate. In *Mwanga v Metal Cans And Closures (K) Limited* (Cause 2978 of 2016) [2022] KEELRC 1108 (KLR) (20 June 2022) (Judgment)On the claim for overtime, it submits that the Claimant never worked past the working hours as per his employment contract which is also clearly evidenced in the Attendance List which has been produced before the court. The Respondent submits that the Claimant has not brought any evidence to the contrary and is therefore not entitled to any payment for overtime. What was placed before the trial court as



to shift the burden to the claimant or have the court disregard the oral testimony from the claimant?. Overtime was merited and the dismissal is a reversible mistake .

Ground 6 Public Holidays

36. The record of appeal shows that the issue of public holidays was captured as follows at page 17(ROA); THAT I would also work during public holidays and was not compensated for the same in addition to not being granted off days. The respondent by law is the custodian of employment records and did not avail any record to challenge the testimony from the claimant as contained in the record. The claimant proceeds to calculate the number of days he worked during public holidays as contained in the memorandum of claim. No challenge is offered either mathematically and or evidentiary. REGULATION 9: 9. Public holidays(1) The days specified in the Second Schedule including any other day that may subsequently be gazetted as a public holiday shall be holidays with full pay.

(2) Where an employee is required to work on a day which by virtue of subparagraph (1) is a holiday with full pay, the employees shall be paid, in respect of any time so worked, at double the normal rate of wages per hour in addition the payment the employee would have received had he not been required to work on that particular day.

Ground 7 Rest Days

37. The record of appeal at page 110 (ROA) indicates evidence recorded as follows;

Yes, I was entitled to off once a week but I have no guidance. Yes, he indicated in his pleadings that he was not going for his off. The claimant now appellant at page 29(ROA) testified as follows, THAT I was given two rest days in a month instead of for and from January 2021 I was never given rest days. It is not practical to demand that an employee adduces evidence to show that he was not being given rest days especially with the nature of work the claimant did. Where records exist and the employer decides not to avail the same the matter ought to be decided in favour of the employee. REGULATION 8: WEEKLY REST. An employee shall be entitled to one whole rest day each week. No evidence submitted to rebut the assertion that the claimant was never offered rest days.

Burden of Proof in Employment Matters

38. The starting point is section 10(7) of the *Employment Act* that places the responsibility to keep and avail work records before the trial court. The employer herein availed records of the issue of termination and the issue of leave but deliberately withheld records touching on overtime, rest days, public holidays and NSSF deductions. Section 74 places an obligation on the employer to keep records and proceeds to indicate the nature of records to be kept. The burden to reduce an employment contract into writing is squarely on an employer and the particulars of which consists of the special damages herein are required to be in the contract. To place the burden on an employee to prove the working hours when an employer deliberately refused to issue a contract is an injustice.

Gratuity

39. The appellant directed the court to the record at page 110 where the respondent indicates;

I did not contribute to NSSF. The evidence as taken by the trial court shows an admission by the respondent that they did not contribute to NSSF and yet the court makes the following findings; Service Gratuity is not awarded where NSSF contributions are made. That position is erroneous both in law and in fact as there were no contributions made by the respondent



and an exemption exists under regulation of wages regulation 17 which we submitted on and we maintain our submissions were generally not considered. The appellant deserves service now that there were no contributions made by the employer and pursuant to the provisions of regulation 17 of the regulation of wages. The court in *Wanyera v Central Isiolo Investment Limited* (Appeal E002 of 2023) [2024] KEELRC 596 (KLR) (8 March 2024) (Judgment) ‘I also find the claim for service pay merited because the employer had the legal mandate to register the claimant, deduct and remit NSSF contributions for him. The allegation that the appellant refused to register with the NSSF has not been substantiated by evidence. The respondent did not adduce any letter or other documentary evidence to prove that it requested the appellant to register with the NSSF but he declined. Consequently, I find that the appellant is entitled to service pay for the five years served at the rate of 15 days’ basic salary for each completed year of service equalling to Kshs. 75,000.’ The respondent not only failed to remit the contributions but also failed to equally deduct and contribute his share of the contributions and hence the prayer for gratuity was merited as submitted above.

Under Payment

40. The evidence is to the effect that the claimant was paid Kenya Shillings 10,000 per month while the minimum wage was at Kenya Shillings 15,141.95 resulting in an underpayment of Kenya Shillings 236,486 and we say this is the most obvious prayer. We pray that the court reverses the finding by the trial court and awards the underpayment as prayed. The court in *Matoke v Suchak (Appeal E046 of 2022)* [2023] KEELRC 2393 (KLR) (5 October 2023) (Judgment) Addressing this matter, the Court of Appeal in *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* (supra) stated as follows: “On the specific terminal dues, once again there were no records by the appellant with regard to the amount of salary that was paid to the respondent; and whether the respondent took or was paid in lieu of rest days, leave days or public holidays. Similarly, by dint of Section 10(7) of the *Employment Act* the burden of proof lay with the appellant to demonstrate that the respondent was not entitled to the terminal dues she was claiming. More so, considering that being the employer, he is the recognized custodian of such records under Section 74 of the *Employment Act*. On the issue of underpayment, the first consideration would be the determination of the salary that was paid to the respondent. In light of the fact that the appellant failed to produce evidence on the terms of the respondent’s engagement as envisioned under Section 10(7) of the *Employment Act*, we, like the ELRC, are inclined to accept the respondent’s version, that is, that she was paid a monthly salary of Kshs. 4000.” There was no evidence to suggest that the claimant was not under paid .

Respondent’s submissions

Whether the Appellant was underpaid

40. The Appellant faulted the trial Court for making a finding that there was no underpayment. The trial Court stated that, “There was no underpayment since the Claimant agrees to have been paid what they agreed upon.” (Refer to page 114 of the Record of Appeal.) That though the Appellant alleges that he was being underpaid, it is unclear what figure he used to base his claim. In the Memorandum of Claim (Refer to page 13 of the Record of Appeal), it is stated that the salary paid to Appellant was Ksh 13,000/=. In his witness statement the Appellant stated that he was paid Kshs. 10,000/= (Refer to page 27 of the Record of Appeal.) and during trial, the Appellant testified that he was earning Ksh 10,700/= and later changed the figure to Kshs. 9,700/=. (Refer to page 107 of the Record of Appeal.) From the foregoing it is unclear what figure the Appellant is relying on in his claim for underpayment. The Appellant was paid what was agreed upon with the Respondent at the commencement of employment. In the case of *Jackson Kanigia Myagah v University of Nairobi*



[2022] KEELRC 324 (KLR) the Court held as follows: "From the pleadings and the documents relied upon by the Claimant as evidence of underpayment dated 18th March 2015, it is unclear when the underpayment of the Claimant commenced or whether the Respondent acted on the letter from the Ministry of Labour, Social Security and Services. The claim lacks the certainty and particularity required in a claim for special damages. The claim is declined." The Appellant being employed as a security guard was always paid his dues as had been agreed upon when he started employment and the trial court was right to dismissed this claim

Whether house allowance was consolidated with basic pay

41. On the issue of house allowance, the Appellant faults the trial court for finding that the house allowance had been consolidated with basic pay. The trial court stated as follows, "House allowance, I do agree with the Respondent's advocate that the same can be consolidated in the basic pay of which in this case the Claimant did not raise any issue." (Refer to page 114 in the Record of Appeal.) The Respondent testified that the Appellant was paid a salary that was inclusive of house allowance and that the Appellant had agreed to the same. (Refer to page 109 in the Record of Appeal.) The court in *Enoch Thiong'o Kibathi v Directline Assurance Company Limited* [2021] e KLR observed as follows; "Although house allowance is a statutory right under Section 31(1) of the *Employment Act*, the obligation of the employer to provide reasonable accommodation for the employee at his cost or pay the employee sufficient sum for rent, in addition to the salary or wage, this provision does not apply if the contract of employment contains a provision which consolidates as part of the basic wage or salary of the employee an element intended to be used by the employee as rent or which enable the employee to have housing accommodation. Consequently, the Claimant's prayer for house allowance is dismissed." Furthermore, in the case of *Kenya National Private Security Workers Union v Watchdog Limited* [2018] eKLR Nduma (J) observed that:-

"The Claimant has in respect of both the claim for recognition and underpayment failed to tender any tangible evidence to prove on a balance of probabilities... nor has it tendered any evidence to show that its members who are employees of the Respondent were being underpaid and were not paid overtime when they worked beyond the regulated normal hours." The respondent submitted that the Appellant was paid a consolidated salary inclusive of housing allowance and he never raised any complaints before his resignation. The Appellant in his testimony before the trial Court stated that he was always paid the agreed salary before he resigned and thus the trial Court was right in dismissing his claim.

Whether the Appellant worked overtime and during public holidays

42. The Appellant faults the trial court for making a finding that there was no evidence to confirm that he actually worked overtime and during public holidays. The Trial Court held that "I do not therefore agree with the Claimant together with issues of overtime and rest days since there was no evidence to confirm that he actually worked during the public holidays." (Refer to page 114 of the Record of Appeal.) The Appellant testified before the trial court that he worked overtime but he did not have any witness to confirm the same. He further testified that he had asked to be paid for public holidays for over 7 years but did not write a letter in that regard. (Refer to page 108 of the Record of Appeal.) The Court of Appeal in the case of *Ngunda v Ready Consultancy Limited* (Civil Appeal 129 of 2019) [2022] KECA 577 (KLR) (4 February 2022) held that:- "On the issue of payment for 33 public holidays, 152 Sundays, and 5184 hours of overtime, the learned judge was not satisfied that a firm basis was established, and dismissed the claim. An analysis of the record does not disclose that these claims were properly established. No evidentiary proof was provided that the appellant worked on those days. There were no details or particulars given of the public holidays or Sundays worked.



Did he work on all public holidays and Sundays, or just some of them? Which days in particular? As regards the alleged overtime, there was no breakdown of the 5184 hours into the days to which they related. As it were, it would seem that the appellant was engaged in overtime work continuously for the entire 5184 hours, which is neither feasible nor humanly possible. As correctly submitted by the respondent, he who alleges must prove. Since the appellant did not provide any proof that he worked on public holidays or the Sundays, or indeed overtime, contrary to his assertions, the burden not shift to the respondent to provide further evidence in this regard. As rightly observed by the learned judge, the appellant did not clock overtime, and there was no record to show that he attended the workplace on public holidays or on Sundays." The Appellant did not satisfy the burden of proof required since he did tender any documentary evidence to support his allegations that he worked overtime and on public holidays. He insinuates he worked on all public holidays and Sundays besides working overtime. The details of the days and hours worked were not provided for during trial and neither did he provide any evidence support the same. His assertions as such are unsubstantiated and the trial Court rightfully dismissed this claim.

Weekly rest

43. The Appellant faulted the trial court for dismissing his claim for weekly rest for lack of evidence. The Appellant in his written statement stated that he was never issued with any rest days and then proceeded to admit later in the same witness statement that he was given two rest days in a month. (Refer to pages 28 and 29 of the Record of Appeal.) The Respondent testified that the Appellant was entitled to one rest day per week which he took during the course of employment. Refer to page 110 of the Record of Appeal.) In the case of *Twiga Construction Limited v Julius Nyamai Mulatia* [2018] eKLR the court observed as follow. "Apart from the claims for notice and leave pay which are admitted by the Respondent in its Defence, the Claimant claims underpayment and compensation for working on public holidays and weekly rest days. All these claims are in the nature of special damages which must be specifically proved. Apart from his word, the Claimant did not provide any evidence to support any of these claims which therefore fail and are dismissed." In the case of *Omukatia v Kenvic School* [2023] KEELRC 753 (KLR), the Court held as follows: "The prayer for weekly rest days was not proved beyond the averments of the Petitioner which were denied by the Respondent. No evidence was adduced to prove that the Petitioner worked on rest days nor did the Petitioner indicate how he arrived at the figure of Ksh. 1.010.688 that he claims. The prayer must therefore fail for want of proof. The same is accordingly dismissed." The appellant merely alleged that he never was given any rest days. However he did not tender any evidence at trial to support this allegation and as such the trial court was right to dismiss the claim.

Service Gratuity

44. The Appellant has faulted the trial court for dismissing his claim for service gratuity and making a finding that service gratuity is not awarded where NSSF contribution are made. (Refer to page 114 of the Record of Appeal,) On the issue of service pay the Respondent relied on the case of *Elijah Kipkoros Tonui vs. Nqara Opticians T/A Bright Eyes Limited* [2014] eKLR, where the court held that: "This law (Service Pay) is intended to ensure employees do not enter into retirement without social security. At the same time, the interest of employers is safeguarded, through the restriction on employees being paid double social security benefits. Service pay is therefore payable under Section 35 only to employees who are not covered under the different social security mechanisms elaborated under Section 35".. In *Monica Wanza Mbavu v Roofspec & Allied Works Co Ltd* [2021] eKLR the court held as follow." The Prayer for service pay also fails. Sections 35 as read with section 36 of the *Employment Act*, 2007, expressly provide for the instances where employees are not entitled to service pay. The claimant was a registered member of the National Social Security Fund to which monthly contributions of Kenya



Shillings four hundred (Kshs. 400) was made towards the social security fund for the Claimant. She falls under the category that is expressly excluded by the aforesaid sections." The Appellant presented before Court a statement showing payments made to the National Social Security Fund by the Respondent for the year 2016. (Refer to page 40 of the Record of Appeal. This shows that the Claimant was a registered member of the National Social Security Fund and as such he was not entitled to service pay. The Appellant did not present to Court the NSSF statements for the other years when he was in employment by the Respondent so as to show that no payments were remitted. It is also important to note that the Appellant's claim was not for service pay but rather service gratuity which claims are not synonymous.. The Court in *Ouru v Eveready Security Guards Co. Ltd*[2023] KEELRC 3049 (KLR) held as follows: "Whereas service pay is statutorily provided for under Section 35(5) of the [Employment Act](#), 2007 and is only triggered where the provisions of Section 35(6) of the Act are inapplicable, service gratuity is contractual and the Appellant did not demonstrate that his contract of employment had a provision for service gratuity." The Appellant did not prove that the Respondent was contractually obligated to provide service gratuity and as such the trial court was right in dismissing the claim.

Leave days

45. The Appellant faulted the trial court for dismissing its claim for annual leave. The trial court stated that." The Claimant applied for leave in all those years and clearly from each application letters attached herein together with his request each did not carry any denial of leave. I do therefore decline to grant the same." (Refer to page 114 of the Record of Appeal.) The Applicant in his Statement of Claim and witness statement denied ever getting leave days during the course of his employment. (Refer to pages 17 and 28 of the Record of Appeal.) That during trial, the Appellant testified that he did not go for leave for almost three (3) years being 2019, 2020 and 2021. Upon being interrogated on the letters requesting for leave written by him, he admitted to going for leave for those three (3) years. (Refer to pages 107 and 108 of the Record of Appeal.) The Respondent produced at trial documentary evidence being leave application forms and letters requesting for leave duly signed by the Appellant showing that he went for leave during the course of employment. (Refer to pages 51, 52, 54, 55, 56, 57 and 58 of the Record of Appeal.) It is clear that the Appellant intentionally lied before the trial court so as to unjustly enrich himself. The Appellant's claim for leave days was false and unsubstantiated and the trial court was right in dismissing the claim.

Whether the Appellant sufficiently proved his claim

46. The Appellant faults the trial court for placing an unjustified burden of proof on him in regards to the special damages. The Court in the case of *Apex Steel Limited v Dominic Mutuamuendo* [2020] KEELRC 567 (KLR) stated as follows:"It is trite that a party making any claim for special damages is under the duty to specifically plead the particulars of his/her claim and adduce evidence to specifically prove the same. Such duty is so central in civil litigation that it cannot be waived by the failure by the opposing party to tender any evidence in defence." The Court in *Asakhulu V West Kenya Sugar Company Limited* [2024] KEELRC 705 (KLR) stated as follows: "The Court holds that the appeal on claims for underpayment and all other reliefs dismissed by trial court have no foundation as per the foregoing re-evaluation of evidence before the trial court. The court finds no evidence placed before the trial court on claims of underpayment, rest days, public holidays, leave and overtime. These are claims in nature of special damages and must be specifically proved."



Decision

47. The court re-evaluated the evidence before the trial court to reach its own conclusion on reliefs sought in the claim save for those related to the fairness of the termination (*Selle v Associated Motor Boat Co.* [1968] EA 123).

On underpayment

48. The trial court did not make a specific finding on the relief. The claimant/appellant stated he was underpaid. He pleaded he was paid Kshs. 13000 and that was confirmed by DW1. The appellant stated that he was underpaid under the minimum wages which he pleaded was below the 2018 minimum wages for night security guards at Kshs. 15141.95. The court considered the The Regulation of Wages (General) Order, No. 120 Of 1982. It is stated in Regulation 3. 'Basic minimum wage

- (1) No person to whom this Order applies shall be employed at a basic minimum wage less favourable to him than that which is applicable to him under the First or Second Schedule, having regard to his age and to the circumstances of his employment by reference to columns 2, 3 and 4 thereof and to the nature of his occupation, as listed in column 1 thereof to be determined by reference to the definitions contained in the Third Schedule.
- (2) An employer shall ascertain the basic minimum wage to which any person employed by him is entitled under the provisions of this Order by reference to the particulars of his birth or apparent age.”(emphasis given) The court finds the basic salary of Kshs. 13000 was below the minimum wages due to the appellant as a security guard and that was unlawful. The claimant sought underpayment backpay for the period May 2017 to March 2021. In statement he stated June 2019. He adopted the same as his evidence. That was also the finding of the trial court which finding is not a ground of appeal. The court will apply June 2019 as date of the employment for purposes of the appeal. The law does not allow the employer to negotiate with employee to pay less than the basic minimum as per Regulation 3 of the Regulation of Wages(General) Order (supra) and any such agreement to pay less would be null and void . Consequently the court awards the claimant underpayment backpay as follows:-

June 2019 to March 2021 (22 months) thus Kshs. 15141.95 less 13000 total underpayments backpay of Kshs. 2141.95 x 22 months thus back pay of Kshs. 47,122.90 is awarded.

On the claim for housing allowance.

49. The Court finds that the trial court erred in its finding that the basic salary which was below the minimum wage could also be consolidated. The house allowance could not have been deemed to have been paid when the basic salary was in violation of Regulation 3 of the Regulation of Wages(General) Order. The provision of housing is a statutory right of an employee under section 31 of the *Employment Act* to wit:- ‘31. Housing

- (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.
- (2) This section shall not apply to an employee whose contract of service—



- (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or” The court did not find the claimant was housed. He was entitled to payment of house allowance calculated at 15% of the basic minimum wage of KSHS. 15141.95 as per the Regulation of Wages(General) Order , no 4 to wit:-

4. Housing allowance

An employee on a monthly contract who is not provided with free housing accommodation by his employer shall, in addition to the basic minimum wage prescribed in the First or Second Schedule, be paid housing allowance equal to fifteen per cent of his basic minimum wage.” The same is awarded for the aforementioned 22 months of work as follows:-
 $15/100 \times 15141.95 \times 22$ months thus Kshs.49,968.40/-

Claim for leave

50. On perusal of the evidence before the lower court the court found that there was evidence that the claimant applied for leave and the evidence was uncontroverted. I do not find basis to interfere with the finding (Mbogo v Shah).

Service pay.

51. RW1 told the court that he was not contributing to NSSF. The service pay was thus due under section 35 of the *Employment Act*. The same is granted for 2 years of service thus $15607/26 \times 18$ days x 2 years thus Kshs 21610.

On claim for overtime, rest days and public holidays

52. It is trite that excess hours of work must be proved strictly. The claimant made a blanket claim for these claims for the entire period of employment. The court upheld its decision in *Asakhulu V West Kenya Sugar Company Limited* [2024] KEELRC 705 (KLR stated as follows:

“The Court holds that the appeal on claims for underpayment and all other reliefs dismissed by trial court have no foundation as per the foregoing re- evaluation of evidence before the trial court. The court finds no evidence placed before the trial court on claims of underpayment, rest days, public holidays, leave and overtime. These are claims in nature of special damages and must be specifically proved.” This was same position in *Apex Steel Limited v Dominic Mutuamuendo* [2020] KEELRC 567 (KLR) stated as follows: “It is trite that a party making any claim for special damages is under the duty to specifically plead the particulars of his/her claim and adduce evidence to specifically prove the same. Such duty is so central in civil litigation that it cannot be waived by the failure by the opposing party to tender any evidence in defence.” On the blanket claim for excess days all days of work the court was guided by the decision of court of appeal in the case of *Ngunda v Ready Consultancy Limited* (Civil Appeal 129 of 2019) [2022] KECA 577 (KLR) (4 February 2022) held that:- “On the issue of payment for 33 public holidays, 152 Sundays, and 5184 hours of overtime, the learned judge was not satisfied that a firm basis was established, and dismissed the claim. An analysis of the record does not disclose that these claims were properly established. No evidentiary proof was provided that the appellant worked on those



days. There were no details or particulars given of the public holidays or Sundays worked. Did he work on all public holidays and Sundays, or just some of them? Which days in particular? As regards the alleged overtime, there was no breakdown of the 5184 hours into the days to which they related. As it were, it would seem that the appellant was engaged in overtime work continuously for the entire 5184 hours, which is neither feasible nor humanly possible. As correctly submitted by the respondent, he who alleges must prove. Since the appellant did not provide any proof that he worked on public holidays or the Sundays, or indeed overtime, contrary to his assertions, the burden not shift to the respondent to provide further evidence in this regard. As rightly observed by the learned judge, the appellant did not clock overtime, and there was no record to show that he attended the workplace on public holidays or on Sundays." The court was not persuaded that the testimony of the claimant /appellant before the trial court proved the excess hours as sought. The claimant was on leave on some days. How can he then still ask for overtime and rest days for the entire employment? The claim failed for lack of specificity and proof.

Conclusion

53. In conclusion the appeal is allowed for the prayers of underpayment of wages, house allowance and service pay. The Judgment and Orders of the Honourable C.A. Mayamba (SPM) delivered at Nairobi on the 23rd of June, 2023 in MCELRC No. 315 of 2022 is set aside and substituted as follows:-

Judgement is entered for the claimant against the respondent as follows:-

a. Underpaid wages:- 47,122,90

b. House allowance 49,968.40

c. Service pay 21610

Total sum of Kshs. 118,701.30 awarded (a,b and c above) payable with interest from date of judgment

d. Cost of the suit.

54. Costs in the appeal are awarded to the appellant.

55. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF MAY, 2025.

J.W. KELI,

JUDGE.

In The Presence of:

Court Assistant: Otieno

Appellant : Wetaba

Respondent:- Kerubo (Ms) h/b Wanaina

Further Court Order

Stay of 30 days granted.

J.W. KELI,



JUDGE.

