Wafula & another v Equator Bottlers Limited & another (Appeal E026 & E042 of 2024 (Consolidated)) [2025] KEELRC 1421 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1421 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E026 & E042 OF 2024 (CONSOLIDATED)

NZIOKI WA MAKAU, J

MAY 15, 2025

BETWEEN

BETTY NEKESA WAFULA ..... APPELLANT

AND

EQUATOR BOTTLERS LIMITED ..... RESPONDENT

AS CONSOLIDATED WITH

APPEAL E042 OF 2024

BETWEEN

EQUATOR BOTTLERS LIMITED ..... APPELLANT

AND

BETTY NEKESA WAFULA ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. F. Rashid (PM) in Kisumu CMELRC No. 219 of 2022 delivered on 25th June 2024)

JUDGMENT

1. Both appeals herein were consolidated for determination under Appeal No. E026 of 2024 following directions issued by the Court on 20th February 2025. This was necessary as both appeals arose from the same judgment and involved the same parties. To provide clarity, it is important to outline the background leading to both appeals. On 12th October 2022, Betty Nekesa Wafula (hereinafter, where appropriate – "the employee") filed a memorandum of claim before the Magistrate's Court at Kisumu, suing Equator Bottlers (hereinafter, where appropriate – "the employer"). She alleged wrongful dismissal, compulsory labour, character defamation, false entries, and discrimination. The

Employee stated that she was employed by the Employer as a microbial technician on 7th October 2009, earning a basic salary of Kshs. 20,000/- and a house allowance of Kshs. 4,000/-. She claimed to have worked diligently until 23rd July 2022, when her employment was terminated allegedly due to a witch-hunt by her immediate supervisor.

2. According to the Employee, the events leading to her dismissal began on 7th December 2021, when she conducted microbiology tests and obtained results that were out of specification. She immediately reported the anomaly to her supervisor, Mr. John Odemba, who instructed her to record the findings in a black book and share them with relevant stakeholders for corrective action. After doing so, she claimed that the supervisor verbally directed her to enter the values in the "Infinity" quality software as being within specifications, on grounds that corrective measures were being undertaken. As a result, the Employee received a notice to show cause dated 27th May 2022, citing her failure to publish accurate data in the Infinity quality software. She responded to the notice on 31st May 2022 and was invited to a disciplinary hearing held on 9th June 2022. Following the hearing, her employment was terminated on 23rd July 2022, a decision that was later upheld on appeal. The Employee claimed that during her employment, she worked for 12 hours a day, including Sundays and public holidays, without extra compensation. She asserted that this amounted to compulsory labour and harassment. Consequently, she sought the following reliefs from the court:

    a. Reinstatement.

    b. Compensation for unfair labour practices including compulsory labour, character defamation/false entries and discrimination.

    c. Any order or relief the court deemed fit

    d. Costs of the claim

    e. Interest at court rates.

3. In response, the Employer acknowledged the Employee's employment as a microbiological technician but contended that her remuneration included compensation for extra hours and public holidays, as stipulated in her letter of appointment. Upon hearing the matter, the Trial Court delivered a judgment on 25th June 2024. The Magistrate found that the Employee's dismissal was justified. However, the Court upheld her claim for unpaid public holidays and leave arrears and awarded her:

    i. Kshs. 203,520/- for public holidays worked

    ii. Kshs. 84,406/- for leave arrears.

4. Dissatisfied, the Employee lodged a memorandum of appeal contending that:

    a. The Learned Magistrate erred in law and in fact in finding that she had not supported her claim for unpaid extra hours worked.

    b. The Learned Magistrate erred in law and in fact in finding that she had not supported her claim for Sundays worked.

    c. The Learned Magistrate erred in law and in fact in failing to award her costs of the suit.

5. On the strength of these grounds the Appellant urged this Court to allow the appeal, award her compensation for overtime and Sundays worked, and grant her costs both in the lower court and on appeal.

6. Similarly, on 27th February 2025, the Employer filed its own memorandum and record of appeal, asserting that the Trial Court had committed multiple errors in law and fact. Key being:

    a. Failing to take into account considerations that should have been taken into account before entering the judgment.

    b. Failing to apply the applicable laws of evidence on the facts.

    c. Failing to evaluate and consider the evidence it adduced before her specifically the employment contract between the parties.

    d. Violating the Employer's right to a fair hearing under Article 50(1) of *the Constitution*.

    e. Making a finding that there was proof on a balance of probabilities that payment for public holidays had not been made despite the presence of evidence of payment.

    f. Making a finding that Kshs. 203,520/- should be paid for public holidays worked.

    g. Arriving at the award for unpaid public holidays worked despite evidence that the compensation for public holidays was adequately provided for in the contract of employment.

    h. Failing to consider evidence before her that leave days in lieu of public holidays worked were taken.

    i. Exercising discretion injudiciously, improperly and unconstitutionally.

    j. Misapprehending the dispute before it as borne by the pleadings and consequently arriving at findings and orders.

    k. Failing to take into account relevant facts and law and instead considering irrelevant matters in arriving at the judgment dated 25th June 2024.

7. As a result, the Employer equally sought to have the judgment of the Magistrate set aside and to be awarded the costs of the appeal.

8. The consolidated appeal was canvassed by way of written submissions.

Appellant's Submissions

9. The Appellant submits that she worked an additional four (4) hours each day from 1st October 2009 to 3rd August 2022, contrary to the eight (8) hours stipulated in her letter of appointment. While acknowledging that the employer reserved the right to adjust working hours, she contends that requiring her to work from 6:00a.m. to 6:00p.m. without any consideration or regard for the contractual eight-hour workday was inhumane. In support of her claim, she refers to shift sheets documenting her daily 4-hour overtime, that went unpaid. She further relies on the decision in Jackson Kipkoech Togom v Radar Limited [Kericho ELRCA E003 of 2023] [2024] KEELRC, where the court, recognizing that compensation for overtime may vary across organizations, awarded the appellant overtime pay for an additional four hours worked daily.

10. The Appellant cites section 27 of the *Employment Act* and the Fair Labour *Standards Act*, the latter of which mandates overtime compensation for work exceeding 40 hours per week, at not less than one and a half times the regular rate. She asserts that her letter of appointment did not provide for remuneration for extra hours, in violation of section 10(2)(h) of the *Employment Act*. Accordingly, she prays for an award of Kshs. 3,123,250/- under this head. With regard to her claim for working on Sundays, the Employee submits that she was required to report to duty two Sundays each month to supervise

fumigation activities, as per the Employer's schedule. She contends that, by virtue of her position, her physical presence was necessary during these operations. She submits that the Employer's unilateral decision forcing her to work on Sundays a day originally designated as her rest day, was contrary to section 27 of the *Employment Act* which mandates at least one rest day in every seven-day period. She also cites the appointment letter that indicated she was supposed to work from Monday to Saturday. In support, she refers to the plant's fumigation schedules and urges an award of Kshs. 485,780/- under this head. As for costs the Appellant submits that she is entitled to the same citing the Employer's failure to make timely payments, compelling her to incur personal expenses in pursuing this claim.

11. In response to the Employer's appeal, the Employee maintains that working on public holidays was not automatic and points to circulars that expressly directed her to report to duty on such days. Moreover, she asserts that the unilateral extension of working hours—from 8:00a.m. to 5:00p.m. to 6:00a.m. to 6:00p.m.—rendered the employment contract unconscionable and extortionate. She emphasizes that while courts do not rewrite contracts, they are duty-bound to intervene in cases involving manifestly oppressive and unfair terms. In support, she cites the case of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] KECA 319 (KLR).

12. Regarding her claim for leave days, the Employee supports the Magistrate's award but points out a slight miscalculation, which she corrects to a revised amount of Kshs. 88,782.66. She references her June 2022 payslip, which reflects 23.2 accrued annual leave days, and adds that her continued service in July and August 2022 entitled her to an additional 2.2 days of annual leave, calculated at Kshs. 3,126.15 per day. Finally, she urges the court to disregard documents contained on pages 252 to 305 of the Employer's record of appeal, asserting that this evidence was not produced before the Magistrate's Court and should therefore be ignored.

Respondent's Submissions

13. In opposing the Appellant's appeal and in support of its own appeal, the Respondent submits that the Appellant was estopped from claiming compensation for working overtime and on public holidays, having signed a contract that expressly required such work. The Respondent further contends that the Appellant did not raise any concerns regarding additional benefits during her employment. It maintains that parties are bound by the terms of contract and, in the absence of ambiguity, agreements must be interpreted according to their plain meaning. In support of this position, the Respondent relies on National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR) and Centurion Engineers & Builders Limited v Kenya Bureau of Standards (Civil Appeal E398 of 2021) [2023] KECA 1289 (KLR) (27 October 2023).

14. The Respondent also draws attention to Clause 2 of the Appellant's letter of appointment, stipulating that her remuneration covered extended working hours and work on public holidays. It further cites Clause 9, requiring the Appellant to work beyond normal hours due to the nature of her duties. To reinforce its argument, the Respondent references *Kithao v Ital Global Limited (Appeal E070 of 2023)* [2024] KEELRC 1769 (KLR)(28 June 2024) (Judgment), where the court emphasized the importance of explicitly addressing work on public holidays and related compensation in employment contracts, by stating:

> "Working on public holidays and compensation thereof should be one of those vital terms of a contract of employment. The law [section 9 and 10 of the *Employment Act*], directs employer to draw a written contract of employment, and what the terms thereof shall be largely."

15. Regarding the sums claimed for overtime, work on Sundays, and public holidays, the Respondent submits that the amounts were whimsical and arbitrary. It asserts that it is not the role of the court to compute such claims on behalf of a party. In support, it cites the case of Julius Gicheru Gachahi & another v Board of Governors Maragi Secondary School [2013] eKLR which underscored the requirement for a claimant to clearly demonstrate how the amounts claimed were calculated. It also referred to the case of Rogoli Ole Manadiegi v General Cargo Services Limited [2016] KEELRC 1607 (KLR), where the court held that the burden of proving extra hours worked and justifying the amounts claimed rests with the employee. As for the production plan programmes found at pages 55–100 of the Appellant's record of appeal, which purport to demonstrate Sunday work, the Respondent submits that they should be disregarded since they were not part of the original evidence before the Magistrate's Court. Accordingly, the Respondent urges the Court to set aside the award of Kshs. 203,520/- made by the Magistrate.

16. In respect of leave days, the Respondent submits that the Magistrate erred in granting this relief. It maintains that the Appellant had taken leave for all the years she worked, as evidenced by leave application forms included in its record of appeal. With respect to costs, the Respondent prays that they be awarded in its favour, asserting that it has successfully made its case. In conclusion, the Respondent urges the court to set aside the entire award made by the Magistrate.

17. The Appeals before the Court were superseded by records of appeal that had evidence that was not adduced before the Magistrate's Court. Both the Employee and Employer are guilty of embellishing their cases after judgment. There was no leave sought to adduce additional evidence. As such both records were full of legal hurdles from the onset. Be that as it may, this being a first appeal, it is in essence an appeal on both facts and the law. As the first appellate court, I am therefore 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 and must accordingly give due allowance for that disadvantage.

18. The Employee was engaged vide a letter dated 7th October 2009. She was entitled to Kshs. 20,000/- as basic salary, house allowance of Kshs. 4,000/- and this was stated to be the only remuneration due per clause 2 of the contract. The clause provided as follows:

> You will be paid a Basic Salary of Kshs. 20,000.00 and a Housing Allowance of Kshs. 4,000.00 payable at the end of each month. The salary will be reviewed from time to time and at the sole discretion of the Company. No other emoluments and or benefits are payable to you and it is a condition of your employment that the aforementioned remuneration covers also a consideration for any daily or nightly extended or extra hours or public holidays you may be called upon to perform on the dictates of your job.

19. The Employer further provided in clause 9 on overtime that the employee would not be entitled to any additional payment for such work. The clause provided as follows:

> Please note that due to the nature of your work, you will be required to work outside of normal working hours on a regular basis and ad hoc basis. No other emoluments or benefits are payable to you and it is a condition of your employment that the aforementioned remuneration covers also a consideration for any daily or nightly extended or extra hours or public holidays you may be called upon to perform on the dictates of your job.

20. The above clauses were focal when the Employee sued the company as the Magistrate's Court found that a sum of Kshs. 203,520/- was due as pay for public holidays worked. The evidence was in the show cause letter itself. It is trite that overtime and pay for public holidays is computed differently. The

general maximum working hours are 52 hours per week, with 60 hours allowed for night workers. The law sets a maximum but typically, normal working hours are 45 hours a week. Overtime is paid at the rate of 1½ times the normal hourly rate for work exceeding the normal weekly hours, and twice the rate for work done on rest days or public holidays. The Employer therefore has two clauses in the contract of employment that are illegal. One cannot receive a global sum to cover for overtime and work on rest days and public holidays. As the Magistrate's Court found there was a sum payable for the public holidays worked on the basis of evidence adduced, I would uphold the award. Like the Magistrate's Court, I am unable to make an award for overtime though if the Employee had made out a case by attaching evidence of overtime I would have been glad to award it. The Employee was also awarded leave arrears which I will uphold.

21. The dismissal was for cause. The transcript of the proceedings shows the Employee was heard, she gave her explanation both in response to the show cause and even in the disciplinary hearing. The elements of fairness under section 41 and Article 41 of *the Constitution* were followed by the Employer and therefore the dismissal was fair and within bounds. The Employee was heard on appeal and the Court notes the panel was very articulate especially the person named Timothy. He was erudite and made the process flow. He should be commended for the manner he conducted the appeal process. The findings of the panel are therefore upheld as the Employee did not bring any additional evidence to controvert the findings. She admitted that she was in a hurry when she input the wrong values in the test results.

22. The foregoing is ample that the Appeal by the Employee succeeds to the extent that the decision of Hon. F. Rashid Principal Magistrate dated 25th June 2024 is upheld in its entirety. On costs, the Employee is entitled to costs at this level of appeal for successful challenge to the appeal preferred against her by the Employer.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2025

NZIOKI WA MAKAU, MCIArb.

JUDGE