Sgs Security Guards Services Ltd v Chepkemoi (Employment and Labour Relations Appeal E119 & E133 of 2024 (Consolidated)) [2025] KEELRC 1362 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1362 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS
APPEAL E119 & E133 OF 2024 (CONSOLIDATED)

JW KELI, J

MAY 9, 2025

BETWEEN

SGS SECURITY GUARDS SERVICES LTD ..... APPELLANT

AND

GLADYS CHEPKEMOI ..... RESPONDENT

(Being an Appeal from the judgment and Order of the Honourable S.A. Opande, PM delivered at the Chief Magistrate's Court at Nairobi on 27th March, 2024 and in MCELRC/E2030/2022)

JUDGMENT

1. SGS SEcurity Guards Services LTD dissatisfied with the judgment and Order of the Honourable S.A. Opande, PM delivered at the Chief Magistrate's Court at Nairobi on 27th March, 2024 in MCELRC/E2030/2022 filed memorandum of appeal dated 12th April 2024 seeking the following Orders:-
    a. The appeal be allowed.
    b. The judgment of the Honourable S.A. Opande, PM delivered at the Chief Magistrate's Court at Nairobi on 27th March, 2024 and in MCELRC/E2030/2022 and the consequential orders be set aside in so far as the Claimant was awarding house allowance and costs of the suit and the orders be substituted with an order allowing the appeal.
    c. The costs of this appeal be awarded to the Appellant.

Grounds Of The Appeal

2. The learned magistrate erred in law and in fact in finding that the Claimant (Respondent herein) was not paid house allowance.

3. The learned magistrate erred in law and in fact in disregarding the Respondent's (Appellant' herein) exhibits, namely pay roll which shows that house allowance was paid.

4. The learned Magistrate erred in law and in fact in disregarding the evidence that the Claimant (Respondent herein) was paid more than the minimum wage prescribed in the Minimum wage order.

5. The learned Magistrate erred in law and fact in awarding the Claimant (Respondent herein) the costs of the suit.

Cross Appeal No. E133 OF 2024

6. The Claimant at trial court, filed a cross appeal dated 26th April 2024 against the same judgment and sought for Orders that the Appeal be allowed, the decision of the learned Magistrate be partly set aside, overturned and or reversed and this Honourable Court be pleased to substitute with an Order that the Appellants suit in the Lower Court be allowed for further prayers of;

    1. The Honourable Court awards the Appellant/Claimant Kshs. 449,280/= being compensation for unpaid overtime worked.

    2. The Honourable Court awards the Appellant Kshs. 108,147.60/= being compensation for unpaid public holidays worked.

    3. The Honourable Court awards the Appellant Kshs. 54,000/= being compensation for unpaid amount for leave not granted.

    4. The Honourable Court awards the Appellant Kshs. 3,300/= being compensation for unpaid amount for leave travelling allowance.

    5. The Honourable Court awards the Appellant interest on the total.

    6. The Honourable Court awards the Appellant/Claimant costs for this Appeal.

Grounds Of The Cross-appeal

7. The learned Magistrate erred in law by proceeding under the wrong principles of Employment and Labour Laws.

8. The learned Magistrate erred both in law and fact by failing to evaluate the evidence presented before him that clearly shows that the Appellant was employed as a day security guard staff number C1108 while the payroll produced by the Respondent was for an employee with similar names as the Appellant with employee payroll number C0562.

9. The learned Magistrate erred in law by failing to properly consider section 9, 10, 20 and 74 of the Employment Act on the responsibility of the Employer to keep and produce Employment records. The Respondent admitted being in possession and custodian of job.

10. attendance time sheets, pay slips, payment registers, leave request records, statutory compliance certificates and other records but failed to file the same before court.

11. The learned Magistrate erred both in law and fact by failing to evaluate the evidence and the Appellant/ Claimant testimony that she was never issued with a pay slip that could have shown the various variables of benefits and deductions on his salary.

12. The learned Magistrate erred both in law and fact by failing to evaluate the evidence and the Appellant testimony that she reported to worked at 6.00 am up until 6.00 pm but was never compensated for

overtime worked. The Appellant worked for four overtime hours each day. The Learned magistrate erred in fact and law by placing a higher burden of proof on the Appellant/Claimant to prove that she used to proceed on overtime or has unpaid overtime days when it was clear that the Respondent kept all the job attendance and time sheet records.

13. The learned Magistrate erred both in law and fact by failing to consider that the Appellant was never issued with a written employment contract and was paid through his Airtel money account a monthly salary of Kshs. 18,000/= which amount was never inclusive of housing allowance, overtime payment, public holidays worked, unpaid amount of leave not granted and rest days. The learned Magistrate only reached a conclusion that there was no proof that the Appellant/Claimant salary was inclusive of housing allowance hence awarding her Kshs. 97,200/= as housing allowance. The learned Magistrate failed to award other benefits.

14. The learned Magistrate erred both in law and fact in disregarding the evidence that there were no payments rates or amounts set by the Respondent for compensation for overtime, public holidays, leave days or rest days worked. The Magistrate failed to consider the provisions of the Labour Institution Act which stipulates for other payment rates and benefits. The Magistrate further failed to consider the provisions of the regulation of wages (General) (Amendment) Order, 2018 that provides for minimum wages exclusive of housing allowance.

15. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Kshs. 449,280/= on account of overtime hours worked despite the overwhelming evidence and testimony by the Appellant that she worked twelve (12) hours daily shift that started at 6.00 am up until 6.00 pm. The payroll records presented by the Respondent are clear that there were other payments made but there is no indication of any overtime payment done. The Appellant is entitled to compensation for overtime worked.

16. The learned Magistrate erred both in law and fact by failing to find that the Appellant was never issued with any pay slip that could have indicate the various deconsolidated benefits that was offered to the Appellant as such arriving to a wrong conclusion that there was no proof before court that the Appellant used to proceed on overtime or has unpaid overtime days.

17. The learned Magistrate erred both in law and fact by failing to appreciate that on 2 ^ (nd) June 2022, the Appellant tendered her resignation letter which was accepted, her terminal dues were calculated and which calculation was part of the dispute between the parties. The Appellant expected among her terminal benefits calculations to be factored her housing allowance, overtime benefit's, un paid amount of leave not granted, public holiday payments, leave travelling allowance and rest days payments.

18. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Kshs. 108,147.60/= on account of unpaid public holidays worked despite the overwhelming evidence and testimony in support of the Appellant claim. The fact that the Respondent provided security services during public holidays was never in disputed. The Respondent also never disputed the Appellant claim that she 20 reported to work during pubic holidays. The Appellant was in Law entitled to be paid twice the normal rate for every public holiday worked.

19. The learned Magistrate erred both in law and fact by failing to address his mind to the Muster work sheets presented before court by the Respondent which records clearly support the Appellants case that she worked during public holidays. A sample of various Muster work sheets presented show that the Appellant worked during public holidays among them being on 1st May 2022, which was labour day, on 1st June 2022, which was Madaraka day, on 12th December 2021, which was Jamhuri day, on 25th December 2021, which was Christmas day, on 10th October 2021, which was Utamaduni day, on

20th October 2021, which was Mashujaa day, on 12th December 2020 which was Jamhuri day, on 25th December 2020 which was Christmas day, on 1st June 2019, which was Madaraka day among others as further reflected by the Muster work sheets.

20. The learned Magistrate erred both in law and fact in failing to make an award in favour of the Appellant/Claimant for the sum of Kshs. 54,000/= on account of unpaid amount of leave not taken for at least the last three years of service and Kshs. 3,300/= on account of leave travelling allowance by the Appellant which the Appellant was in Law entitled.

21. The learned Magistrate erred both in law and fact by failing to evaluate the evidence and the Appellants testimony that she was never granted leave and that it was the Respondents managers who allocated leave days and that it was the Respondent managers who could decide and notify a staff to proceed for leave. No leave forms were presented before court by the Respondent to rebut the Appellant Claim despite the fact that the Respondent admitted being the custodian of leave form records.

22. The learned Magistrate erred in law and fact by failing to apply the law and appreciate the correct evidence adduced and tendered in Court.

23. The learned Magistrate misdirected himself in his analysis, evaluation, interpretation and assessment of the entire evidence tendered by the Appellant/Claimant and thus arriving at a wrong, erroneous and unjust conclusion and judgment.

24. The learned Magistrate erred in law in basing part of his decision on extraneous factors.

25. Part of the decision is contrary to law and a misapprehension of the law.

Background To The Appeal

26. The Claimant filed claim dated 23rd September 2022 on alleged unfair dismissal and sought for compensation, housing allowance, untaken leave and leave travel allowance, unpaid public holiday, overtime, rest days, notice pay all for the total sum of Kshs. 1,283,009.20, certificate of service, costs and interest. (pages 1-23 of ROA was the claimant's case). The claim was opposed by the respondent who filed memorandum of response, witness statement and documents (pages 24-68 was the Response).

27. The claimant's case was heard on the 14th September 2023 where she testified on oath and was cross-examined by counsel for the respondent. The respondent's case was heard on even date with Emasto Awiyo Kingondu as RW1, she produced her documents and was cross-examined by counsel or the claimant. The parties filed written submissions on the close of the respondent's case.

28. The trial court delivered its decision in favour of the claimant and dismissed claim for unfair termination, leave, public holidays, rest days unremitted NSSF dues and leave travel allowance. The court awarded Kshs. 97000 as an unpaid house allowance. (Pages 99-104 of ROA was the judgment).

Determination

29. The appeal was canvassed by way of written submissions. Both parties complied.

30. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. Ltd [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."

31. The court on first appeal is further guided by the principles on appeal decisions in Mbogo v Shah [1968] EA De Lestang V.P (as he then was) observation 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

32. The appellant submitted on the following issues:-

    a. Whether the Appellant paid the Respondent house allowance; and

    b. Whether the cross-appeal is merited.

33. The Cross-Appellant's/ Respondent's submitted on the following issues:-

    i. Whether the Respondent was entitled to be awarded payment for unpaid amount for leave not taken, overtime, unpaid public holidays, leave travelling allowance, unremitted NSSF dues and rest days.

    ii. Whether the Appeal is merited.

    iii. Who will bear the cost of the Appeal.

34. The court found that the issues for determination in both appeal and the cross-appeal were:-

    a. whether the trial court erred in awarding house allowance

    b. Whether the Respondent/ cross-appellant was entitled to be awarded payment for unpaid amount for leave not taken, overtime, unpaid public holidays, leave travelling allowance, unremitted NSSF dues and rest days.

    c. whether the appeal was merited and the issue of costs

    d. whether the cross-appeal was merited and the issue of costs.

DIVISION - Whether the trial court erred in awarding house allowance

Appellant's submissions

35. The Claimant was employed by the Respondent as a security guard. At the time of separation, the respondent was earning a salary of Kshs.18,000 which included a house allowance. The Respondent was paid a consolidated salary, as evidenced by Payrolls that were adduced in evidence, and they reflected a net salary that was all inclusive of all the allowances, including house allowances. (refer to Page 35 of the Record of Appeal). It is critical to point out that the Respondent did not testify that the remuneration of Kshs. 18,000/= that she was paid was basic or gross salary. She stated at paragraph 2 of her witness statement that the pay was her monthly salary. This is also pleaded at paragraph 3 (i) (a) of the Claim. That as she did not describe the pay as either basic or gross salary, the court could not know what she understood the pay to mean and therefore the Appellant's submissions that the same was inclusive of house allowance ought to have been upheld.

36. The claimant was not entitled to house allowance because her consolidated salary was well within and in some instances above the provision set out in the regulation of wages[general] [amendment]Order,2015,2017,2018 and 2022. In the case of Patrick Nambila Mikuzi V Ashton Court Apartments Limited [2020] eKLR where the court held that

> " The minimum wage for a cleaner during the period of the Claimant's employment was below the salary he received. I find that the said salary was indeed consolidated and inclusive of house allowance. The claim for house allowance fails and is dismissed." The Regulation of Wages Order was well adhered to and the claimant was paid above the regulations, and that the Honourable court erred in awarding the respondent house allowance owing that it was paid during the pendency of employment. That faiure by the Respondent to issue pay slip is not evidence that house allowance was not paid. The muster roll shows what was paid. Failure to issue pay slip is a statutory breach but the same is not proof of house allowance not being paid.

Respondent's submissions

37. The Appeal is challenging the award of housing allowance of Kshs. 97,200/=. The Respondent in her statement stated that she was not provided with house allowance. Her salary was always deposited in her Airtel Money account. The Respondent was never issued with an itemized pay slip that could have indicated the various deconsolidated benefits she was being offered. The Respondent was paid her salary through Airtel money account as such cannot be said to be inclusive of a housing allowance. The Respondent was never listed on the Appellant pay roll that was produced before the court. The Appellant produced pay roll for employee number C0562 who has similar names with the Respondent whose employment number is C1108. The Respondent testified of not being aware of number C0562.It was the Appellant witness testimony that the Appellant has over 1,000 employees with the pay roll being a sample of its employees. It is clear the pay roll number C0562 does not relate to the Respondent as such the pay roll produced cannot be relied by the court. The Appellant never object to the Respondents claim for a housing allowance. The Labour Institutions Act No. 12 of 2007 provides that an employee is entitled to housing or housing allowance at the rate of 15%. The Appellant never provided this Honourable Court with any documentation to rebut the Respondents claim for provision of a housing allowance. The Appellant never averred that the Respondent payment was deconsolidated or consolidated with her wages as required under section 74 (1)(i) of the Employment Act. The finding by Magistrate on house allowance be upheld by this Honourable Court.

Decision

38. The trial court on housing allowance held that there was no proof that the claimant's salary was inclusive of house allowance and for that reason found the award merited.(page 103 of ROA by appellant) The claimant at the hearing adopted her witness statement of 23rd September 2022 where at paragraph 2 she pleaded:-' I was employed by the respondent as day time security guard at monthly salary of Kshs. 18000". At paragraph 5 she disclosed that she had worked for 6 years and 3 years. She had resigned voluntarily as held by the trial court and the court having perused the resignation letter, concluded the same. At paragraph 6 the Respondent stated that she had been requesting to be confirmed as a permanent employee like other employees of the Respondent who always called her a casual. That the respondent by referring her as casual she was denied some employment benefits like loan housing allowance , leave , overtime payments , rest day payment , sick of and travelling allowance. That she was not issued with employment contract and payslip in line with other staff.

39. The Respondent in paragraph 9 of her witness statement stated that on 2nd July 2022, having resigned she returned her uniform back to the office whereby she was invited by the appellant for negotiations on employment benefits. That the respondent offered to pay her benefits equivalent of 2 years leave and ignore all her other requests for benefits of housing , overtime , rest day , holiday and travelling allowance though the same was paid to staff presumed to be on permanent basis(pages 8-9 of ROA by appellant).

40. The Appellant relied on witness statement of Kingondu (RW1) dated 17th March 2023 where he stated in paragraph 5 that the claimant was earning a monthly salary of Kshs. 18000 inclusive of housing allowance in accordance with the minimum wages orders. That during employment she took leave days, public holidays, one off day every week and was paid overtime when she worked. She gave one-month notice to terminate her employment voluntarily. (page 28-29 of ROA by the Appellant)

41. The resignation letter was dated 2nd June 2022(page 31of ROA by appellant). The respondent stated that she was resigning from the position of security guard and thanked the employer for the opportunity and good working environment for the 6 years of work. The resignation was accepted by the employer on 28th June 2022. During the hearing the claimant told the court she was employed as day guard 12am to 12 pm and paid salary of Kshs. 48000. At cross-examination, she stated that her employment card read No. C 1108. She was shown the payroll with her name in the payroll indicating staff no. C0562 of June 2022 which she had admitted, had provision for the allowances. During cross-examination of RW1, he stated that they did issue payslips, though not in court. That the staff number was not the payroll number. The witness had adopted his statement. There was no cross-examination on the house allowance.

42. On perusal of the Regulations of General wages Order of 2022 effective May 2022 the court noted the Day guard minimum wage was Kshs. 15201.65. The housing allowance rate is of 15% thus Khs. 2280./-. The claimant was paid above the minimum wages at Kshs. 18000. The court found no basis why the trial court had difficulty in finding the claimant pleaded monthly salary and this was not an issue at cross-examination of RW1 who stated the salary was all inclusive in the statement he adopted as his evidence in chief. The court further found that it was more probable than not the claimant's payroll number was C0562 as the amounts indicated were consistent with her earnings. Even without the payroll the court finds that the trial court erred in award of house allowance as the salary of Kshs. 18000 was simply pleaded as monthly salary and was above the minimum wages of the period. I uphold the decision in the case of Patrick Nambila Mikuzi V Ashton Court Apartments Limited [2020] eKLR where the court held that:-

> " The minimum wage for a cleaner during the period of the Claimant's employment was below the salary he received. I find that the said salary was indeed consolidated and inclusive of house allowance. The claim for house allowance fails and is dismissed." In the upshot the appeal is merited and the award of house allowance is set aside.

The Cross Appeal

Issue:- Whether the Respondent/ cross-appellant was entitled to be awarded payment for unpaid amount for leave not taken, overtime, unpaid public holidays, leave travelling allowance, unremitted NSSF dues and rest days

Cross-appellant's submissions

43. The Respondent was employed as a security guard. In exchange of her service she was paid a monthly salary of Kshs. 18,000/= before statutory deductions. She was never issued with pay slip. On 2nd June 2022, the Respondent tendered her resignation letter after working for six years and three months. The Respondent returned the company properties and was cleared. She was promised that her final dues will be tabulated and paid. A dispute arose on the amount tabulated as final dues which the Respondent felt were erroneous. The Respondent case is that the Appellant had promised to factor in the tabulation of the final dues; compensate for overtime, house allowance, non-granted leave pay, payment for public holiday, rest day worked, service pay or clearance of her NSSF and NHIF contribution. She was also to be issued with a certificate of service. The parties having failed to agree on the final tabulated dues, the Respondent instituted a suit at the chief Magistrates Court whose judgement was delivered on27th March 2024 in cause No. MCELRCE/E 2030/2022 by Hon. S.A Opande.

44. The trial Court took note that there was no proof that the Respondents salary was inclusive of housing allowance and awarded housing allowance of Kshs. 97,200/=. The Appellant filed an appeal challenging this award. The Respondent filed a cross appeal after her prayers for unpaid amount for leave not taken, overtime, unpaid public holidays, leave travelling allowance, unremitted NSSF dues and rest days were dismissed. Section 107(1) of the Evidence Act is explicit that;

> " Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The burden of proof required from the Respondent is on a balance of probability. In the case of Nicholus Kipkemoi Korir-Vs-Hatari Security Guards Limited [2016Je KLR the court held as follows:-
>
> "The settled rule in all civil claims is that a party who intends a Court to find or decide any matter in his or her favour must prove all allegations to the required standard of proof in civil claims which is on a balance of probability. Further under section 47 of the Employment Act in any complain of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employees, while the burden of justifying the grounds for termination or wrongful dismissal shall rest on the employer.

Overtime.

45. The Respondent testified that her work shift ran from 6.00 am up to 6.00 pm. She recorded on an attendance register whenever reporting or leaving duty. It was her testimony that she was never compensated for overtime worked despite asking. The Appellant witness confirmed that the Respondent signed a register whenever she reported to duty and the same was never filed in court. No reason was advanced by the Appellant for having failed to file the attendance register. It was the Appellant witness testimony that the Respondent reported at 8.am and left at 5.00pm. His testimony was a clear admission that the Respondent worked for 9 hours which was over the statutory legal maximum of 8 hours. It is also worth noting that the Appellant witness in his written statement never

objected to the Respondents claim for overtime pay. The Appellant had employed day and night guards who had rotational shifts. No reliever guard was ever employed by the Appellant. Section 9 of the Employment Act 2007, obliges an employer to reduce into writing a contract of service which is more than 3 months or a number of working days in aggregate amounting three or more months. Under section 10(7) of the Employment Act, the burden of proving or disapproving an alleged term of employment stipulated in the contract shall be on the employer if the employee fails to produce a written contract in any legal proceeding. Section 74 of the Employment Act places an obligation on the employer to keep the employment records. The Appellant never filed any documents/records to rebut the Claim for overtime. In dealing with the question on of overtime J Mbaru in Abigael Jepkosgei Yator & another Vs.China Hanan International Co. Ltd [2018] eKLR;

'' Claim for overtime is made on the basis the claimants were at work for 11 hours for the 7days a week. Without defence, any work record, this evidence with regard to number of hours worked is not challenged. There was an overtime unpaid for 3 hours per week all being Ksh.173,368.00. Where the claimants remained at work for 7 days in a week, there was no off/rest day taken and any work over and above a reasonable period without rest should be paid for the award of Kshs. 173,368.00.''The Appellant being the custodian of employment records intentionally decided not to file any copy of the attendance register so that he could hide his exploitative behavior. No pay slip was issued to the Respondent that could have reflected overtime payments. The Respondent was paid through her equity mobile money which records do not show any overtime pay.The learned magistrate never advance any ground for not awarding the Respondent overtime pay despite overwhelming evidence that the Respondent worked over the required maximum eight hours.The Appellant has a duty to prove or disapprove the Respondent hours of work. There was no evidence availed by the Appellant in the accepted form with regard to section 9, 10,20 and 74 of the Employment Act. The attendance records could have shown the Respondents working hours. The Respondent produced documents which she was able to access as such she was never expected to produce documents in custody of the Respondent. The trialCourt by dismissing the award of overtime it awarded the Appellant for his exploitative behavior. The court ought to strictly adhere to the law with regard to section 9,10,20 and 74 of the Employment Act.

Unpaid amount for leave not taken

46. It was not in dispute or controverted that the Respondent was never granted leave for the six years that she worked. It was the Respondents testimony that the Appellant had the discretion of granting leave. The Appellant allocated leave days and notified the staff to proceed for leave.It was the Respondent witness testimony that the Appellant had classified his employees as either permanent or casual. It was Respondent testimony that only employees who had been classified as permanent employees would receive benefits like loans, leave, overtime; rest day's payment, public holiday payments. The Respondent was classified as a casual employee as such was never granted any leave.The Appellant witness never objected in his written statement to the Respondent being grated leave pay. The Appellant witness testimony was that the Respondent was granted leave but admitted that no leave records have been filed to support his averments. The Appellant blatantly decided not to adduce leave records in his possession. It was the learned magistrate finding that there was no proof that the Respondent never proceeded for leave. It is worth noting that leave not granted can be proved by production of leave application record. No leave forms were presented before court by the Appellant to rebut the Respondent Claim despite the fact that the Appellant Admitted being the custodian of leave form records. The learned magistrate finding is a clear failure to properly interpret sections 10(3)(a),28(1)(a) and 75 of the Employment Act. The Appellant selectively choose the documents to present in court so that he can cover his exploitative character. It is worth noting that the Appellant

never gave any reasons as to why he opted not to file leave records. The Respondent urged to be awarded leave pay for the last three years of service as she had prayed.

Leave travelling allowance

47. The law requires the employer to offer transport to the employee proceeding for leave. The Appellant has the obligation of production of documents. The Respondent testimony was that she was never granted leave travelling allowance for the duration that she worked for the Appellant.Leave travelling allowance is part of the leave benefits. The Appellant used to pay salary through Airtel money account which is expected the leave travelling allowance could have been forwarded. This claim was never rebutted.

unpaid public holidays

48. The learned Magistrate failed to properly evaluate the documentary evidence supporting the Respondent testimony that she worked during public holiday. The Muster work sheets/attendance sheet support the Respondents case that she worked during public holidays. Appellant's documents attached at pages 49 to 80 of the Records of cross appeal. The Muster work sheets presented show that the Cross appellant/Respondent worked during public holidays among them being on 1st May 2022,which was labour day, on 1st June 2022,which was Madaraka day, on 12th December 2021, which was Jamhuri day, on 12th December 2021,which was Christmas day, on 10th October 2021, which was Utamaduni day, on 20th October 2021, which was Mashujaa day, on1st January 2020 new year's eve, on 12th December 2020 which was Jamhuri day, on 25th December 2020, which was Christmas day, on 1st June 2019, which was Madaraka day among others as further reflected by the Muster work sheets. Reference is on these pages 58,60,63,68,73,75,79 and 80 of the filed record of cross appeal.The master rolls/attendance sheets speak for themselves in support of the Respondents case. The master rolls confirm as how the public holidays arose and has clearly particularized. There is no other proof required that is outside the one provided by the documentary evidence filed in court. The Court cannot be left to imagine where records support the Respondents claim. In an employment dispute, section 74 of the Employment Act obliges the Employer to adduce evidence which in this case support the Respondents claim. The Appellant produced records that support the fact that the Respondent was subjected to work during public holidays and such should be awarded as prayed.

Rest days

49. The Respondent testimony was that she was deducted money from her salary for the rest days granted. This claim was never controverted by the Appellant. The Respondent seeks refund of her salary which was always deducted to cover for the rest days granted. The Respondent was granted 4 rest days every month. The learned magistrate erred in law by failing to award a claim which the Appellant had not objected.

unremitted NSSF dues

50. Section 14 of the NSSF Act (Cap 258) does not stop the courts from issuing an order that unremitted NSSF deduction should be remitted to the relevant statutory body. The Respondents NSSF statement is clear that the same was never remitted for some months.

Respondent's submissions on the cross-appeal

51. it is now trite law that claims for overtime, public holidays, leave days, travel allowance are special damages that must be specifically pleaded and strictly proved. IN Ochieng & another v Pride Kings Services Ltd [2025] KEELRC 213 (KLR) where Gakeri, J. held as follows: Similarly, the claims for

public holidays, off working days, overtime and leave days are unsustainable for want of proof as none of the claimants provided particulars for each of the reliefs sought. More significantly, these claims fall under the rubric of special damages and must be specifically pleaded and strictly proved[underlined for emphasis] That the trial court was right in dismissing the claims for leave days, travelling allowance, public holidays and overtime for want if specificity and strict proof. The Respondent further urged that it was the Appellant to produce records as it is mandated under section 74 of the Employment Act to keep records of employment. That the import of this provision was analysed by the Court of Appeal Patrick Lumumba Kimuyu v Prime Fuels (K) Limited [2018] KECA 198 (KLR) where it was held that:

'Whereas we appreciate that the Employment Act enjoins an employer to keep employment records in respect of an employee, that does not absolve an employee from discharging the burden of proving his/her claim.''That the Respondent had a duty of first proving her case instead of just stating that the employer ought to have produced the records. That further that the claims are time-barred as they fall under continuing injuries which cannot be claimed after the period of 12months in light of section 89 of the Employment Act. The Respondent cannot therefore seek what was allegedly not paid to him 6 years ago. That the Respondent did not provide evidence of working overtime. He did not specify the days he allegedly worked overtime. He never called any witness nor produced (or asked for) attendance register to prove his allegation.

Unpaid public holidays & leave days

52. The claimant did not work on public holidays and when she did the same was remunerated. Further the Respondent did not specify the dates (including month and year) that she allegedly worked but was not paid. She simply made a general allegation that she worked during public holidays and left the court to imagine the rest. In Javan Were Mbango V H. Young & Co. (Ea) Ltd[2012] Eklr where Mbaru, J. held as follows:-

> 'The claim for work on official public holidays though pleaded the same were not confirmed as to how they arise. This Court will decline to make an order in this regard. These must be particularized as to how they arise since each year come with different set of public and official holidays. The Court is cognizant of these differences and it was the claimant's duty to prove which days he worked that fell under this head''

Leave travel allowance

53. The claimant/ respondent never provided any evidentiary documents to assert the travelling allowance claimed. Neither dates of when she was to travel nor how the payments were to be made were pleaded and proved.

Decision

54. Claim for payment of overtime, rest days and public holidays - the trial court relied on the decision in Rogoli Ole Manadiegi v General Cargo Services Limited (2016)e KLR to the effect that in a claim for overtime, the default of employer to produce records does not establish the claim. That the burden of establishing hours or days served in excess of the legal maximum rests with the employee. The court on perusal of the pleadings of the claim and witness statement did not find any pleading on the overtime hours worked. The court found no evidence was produced by the cross-appellant to prove working beyond maximum hours as held in Rogoli Ole Manadiegi v General Cargo Services Limited (2016)e KLR which decision I uphold to dismiss the appeal on overtime and public holidays. On Rest days - The claimant at trial admitted she was given rest days and the court did not understand the basis of the

appeal on the admitted issue (page 130 of her ROA). The court found no basis to disturb the finding of the trial court (Mbogo v Shah) and upheld the decisions on overtime and public holidays as the alleged excess hours were not proved.

Claim of unpaid leave and leave travelling allowance.

55. It was not in dispute or controverted that the Respondent was never granted leave for the six years that she worked. It was the Respondents testimony that the Appellant had the discretion of granting leave. The Appellant allocated leave days and notified the staff to proceed for leave. It was the Respondent witness testimony that the Appellant had classified his employees as either permanent or casual. It was Respondent testimony that only employees who had been classified as permanent employees would receive benefits like loans, leave, overtime; rest day's payment, public holiday payments. The Respondent was classified as a casual employee as such was never granted any leave. The Appellant witness indicated in his written statement that the Respondent was granted leave pay. The Appellant witness testimony was that the Respondent was granted leave but admitted that no leave records have been filed to support his averments. The Appellant blatantly decided not to adduce leave records in his possession. It was the learned magistrate finding that there was no proof that the Respondent never proceeded for leave. It is worth noting that leave not granted can be proved by production of leave application record. No leave forms were presented before court by the Appellant to rebut the Respondent Claim despite the fact that the Appellant Admitted being the custodian of leave form records. The learned magistrate finding is a clear failure to properly interpret sections 10(3)(a),28(1)(a) and 75 of the Employment Act. The respondent submitted that the claimant's pleadings were silent on the year or years in which they did not proceed on leave, whether then applied and it was denied and how many days were pending when they resigned.

Leave travelling allowance

56. The cross-appellant submitted that the law requires the employer to offer transport to the employee proceeding for leave. The Appellant has the obligation of production of documents. The Respondent testimony was that she was never granted leave travelling allowance for the duration that she worked for the Appellant.Leave travelling allowance is part of the leave benefits. The Appellant used to pay salary through Airtel money account which is expected the leave travelling allowance could have been forwarded. This claim was never rebutted as such we pray for the same. The appellant submitted that respondent never provided any evidentiary documents to assert the travelling allowance claimed. Neither dates of when she was to travel nor how the payments were to be made were pleaded and proved. The trial court found no prove of the claimant having not proceeded on leave was produced. The court is guided by Mbogo v Shah and was not satisfied that the trial court 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." Further in the Selle decision on re-evaluation of the evidence before trial court to reach own conclusion. Annual leave is a statutory right of employee. The claimant pleaded that she never took leave and had no employment letter. There was no documents she could have produced to prove that she did not go on leave save for may be an application to proceed on leave. section 28 of the Employment Act provides for annual leave of 21 days. The respondent on this issue ought to have provided the leave records of the claimant on leave in response. The cross appellant alleged she was treated as casual but this was defeated by fact of admission of payment of monthly salary which the court found to be above the minimum wages. The appellant did not justify why she never applied for the leave. Consequently section 28(4) of the Employment Act applied to limit the award of untaken leave to 18 months to wit :-' (4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service

referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose." Thus 21/30x 18000 x 18months total sum awarded on appeal for leave being Kshs 21600 plus the travel allowance o Kshs. 3300 as sought in the claim total Ksh. 24900./-On NSSF claim for 400 not unremitted as per the NSSF statement I noted the trial court relied on my decision in Simiyu v Nzoia Sugar Company Limited (2022)e KLR. I have uphold my decision to apply in the appeal, The decision of the trial court is upheld and the claim for unremitted NSSF dues of Kshs. 400 disallowed. The claim for NSSF dues can be lodged with the NSSF.

Conclusion

57. In the upshot the appeal dated 12th April 2024 is allowed. The judgement of judgment and Order of the Honourable S.A. Opande, PM delivered at the Chief Magistrate's Court at Nairobi on 27th March, 2024 and in MCELRC/E2030/2022 is set aside and substituted by an Order that the claim for house allowance is dismissed.

58. The cross-appeal was allowed for untaken leave and leave travel allowance for total sum of Ksh. 24900.Conseqnently, the judgment and Order of the Honourable S.A. Opande, PM delivered at the Chief Magistrate's Court at Nairobi on 27th March, 2024 and in MCELRC/E2030/2022 is set aside and substituted as follows: - Judgment is entered for the claimant against the respondent for untaken leave and leave travel allowance for total sum of Ksh. 24,900 with interest at court rates from the judgment date. Costs of the claim to the claimant.

59. The court orders each party to bear own costs in the appeal and in the cross-appeal as both were successful in their appeals.

60. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF MAY , 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant : -Kitonyi h/b Odhiambo

Respondent:- Absent