



**Brinks Security Services Limited v Salim (Appeal E108 of 2024)
[2025] KEELRC 1952 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1952 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E108 OF 2024**

**M MBARÚ, J
JUNE 30, 2025**

BETWEEN

BRINKS SECURITY SERVICES LIMITED APPELLANT

AND

HAMISI SALIM RESPONDENT

*(Being an appeal from the judgment of Hon. D. Orimba
delivered on 15 May 2024 in Mombasa Cause No. 688 of 2021)*

JUDGMENT

1. The appeal arises from the judgment delivered on 15 May 2024 in Mombasa CMELRC No. 688 of 2021. The appellant is seeking that the judgment be set aside with costs.
2. The background of the appeal is a claim filed by the respondent on the grounds that he was employed by the appellant starting 1 February 2017 as a night security guard with a monthly salary of Ksh. 10,500. He worked until 15 August 2021 and alleged that his employment was unfairly terminated. He claimed that there was underpayment of wages and that he worked overtime without compensation. Under the contract, the respondent was entitled to four days off each month, but in February, April, June, and July 2021, he did not take his days off. On 1 March 2021, the respondent went on his annual leave of 25 days, which ended on 31 March 2021. On 11 August 2021, his uncle died, and he sought leave to attend the burial; however, when he returned on 15 August 2021, the appellant dismissed him without notice or payment of terminal dues. He claims entitlement to his terminal dues.
 - a. Notice pay Ksh.17,413.20;
 - b. Off-days arrears of 16 days Ksh.23,249.60;
 - c. Salary for days worked Ksh.8,706.60;
 - d. Overtime worked Ksh.323,213.85;



- e. Severance pay for 4 years Ksh.34,826.40;
 - f. Underpayments Ksh.269,614.80;
 - g. 12 months compensation Ksh. 208,958.40;
 - h. Certificate of service;
 - i. Costs of the suit.
3. In reply, the appellant submitted a response and counterclaim. The response consists merely of denials. The counterclaim states that the respondents did not report to his duty station on 11 August 2021 and failed to communicate his whereabouts. By failing to attend work, the respondents terminated his employment without notice under Section 35 of the *Employment Act*. He should pay notice pay of Ksh. 10,500 as claimed.
 4. Aggrieved by the judgment, the appellant filed the appeal on the basis that the court erred in finding that the respondent did not desert duty but was unfairly terminated in his employment and hence entitled to notice pay. The award of Kshs. 23,245 as off duty was in error, together with Ksh.8,798 for days worked, overtime of Ksh. 323,213 because there was no proof of work done. The award of severance pay was not justified in this case. Without proof of unfair termination of employment, compensation was not due as awarded.

DIVISION - Determination

5. This is a first appeal. The court must reassess and review the record and reach its conclusions.
6. The respondent's case was that the appellant employed him as a guard from 1 February 2017. When he took time off for burial, upon returning on 16 August 2021, the appellant dismissed him without good cause.
7. The applicant employed the respondent as a guardian through a contract dated 1 February 2017, which he accepted on the same date.
8. Part of the records filed by the appellant is the notice dated 17 August 2021 on the respondent's desertion of duty. This letter is sent to the representative and copied to the County Labour Officer as required under Section 18 of the *Employment Act*.
9. Desertion of duty, failure to attend work without good cause, or absence from duty without the employer's permission is classified under section 44(4)(a) of the *Employment Act* as gross misconduct. If the employee remains absent, the employer is obliged to issue a notice to address the absence. If the issue is not resolved, as this constitutes gross misconduct, the employer must issue a notice of termination of employment with a copy to the Labour Officer.
10. The appellant addressed this matter. The respondent does not dispute the notice dated 17 August 2021, which was served to him and copied to the Labour Officer. To support his claim that he resumed duty after attending his uncle's burial on 16 August 2021, he does not explain the appellant's notice. Additionally, the respondent testified in court on 19 April 2022 that on 11 August 2021, he requested permission to go home for the burial. He sent a message via his phone, but there was no approval for the request.
11. Absence from work without the employer's permission is an act of gross misconduct. It justifies summary dismissal. The subsequent desertion of duty is addressed through notice dated 17 August 2021.



Notice pay is not due.

12. Following desertion of duty, there was a fundamental breach of the employment relationship by the respondent. He is not entitled to compensation.
13. On other claims, taking an off day is a right under section 27 of the *Employment Act*. The employer should keep a work record of all days the employee is absent from duty for the purpose of taking the off day.
14. The respondents confirmed that he took his 25-day annual leave from 1 to 31 March 2021. His claim for off days pertains to February, April, June, and July 2021. There is no record of how the remaining days were allocated, so this claim for Ksh.23,249 is deemed justified.
15. Regarding the claim for pay for days worked in August 2021, regardless of the reason for termination of employment, the employee should be compensated for the days worked under sections 17 and 18 of the *Employment Act*.
16. The last day the respondent was at work was 10 August 2021. For the 10 days worked, the due wage was Ksh. 15,608.85 per month. For 10 days worked in August 2021, the respondent is entitled to Ksh. 5,202,65.
17. Regarding the overtime claim, the respondent's case was that he worked 12 hours per night from 6pm to 6pm and 10 hours per day from 6am to 6pm. This claim is not supported by evidence. The difference between the night and day shift hours is not addressed. The overall claim for overtime worked over three years for six days is generalised.
18. Overtime worked daily constitutes a continuous injury that must be addressed under section 89 of the *Employment Act*. It should not accumulate beyond the 12-month period specified in the law. Without details of the 6 days worked during day or night shifts, assessing the alleged overtime is not feasible.
19. What constitutes a continuing injury claim in the context of an employment relationship was considered in the case of *The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR). The court held that claims which accrue monthly form part of a continuing injury and that;

Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90.'

20. In this case, delay combined with lack of specificity invalidates these claims for overtime pay. See *Gontier v Acacia Medical Centre Limited* [2024] KEELRC 2282 (KLR)
21. On the claim for severance pay, such does not accrue save in a redundancy.



22. On the claim for underpayments, the payment statement filed for the respondent had a gross wage of Ksh. 10,500 per month. It is not contested that the respondent was employed as a guard and had a written contract. He was deployed at Kengeleni, Mombasa County.
23. Under the applicable Wage Orders in 2017, a guard had a basic wage of Ksh.13,572.90 per month plus a 15% house allowance of Ksh. 2,035.95. The total gross wage was Ksh. 15,608.85.
In this case, there was an underpayment of Ksh . 5,108.85 per month.
For the 39 months worked, the underpayment is Ksh . 199,244.55.
24. On costs, the judgment of the trial court thus analysed, the review herein necessary, each party should bear its costs.
25. Accordingly, judgment in Mombasa Cause No. E688 of 2021 is hereby reviewed in the following terms;
 - a. Pay for 10 days worked in August 2021 Ksh.5,202,65;
 - b. Underpayment of wages Ksh.199,244.55;
 - c. Each party to bear its costs for the appeal and trial court proceedings.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 30 JUNE 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

