



Ndlo & 17 others v Brinks Security Services Limited (Appeal E272 of 2024) [2025] KEELRC 1928 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1928 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E272 OF 2024**

**M MBARŪ, J
JUNE 30, 2025**

BETWEEN

WILSON M NDLO 1ST APPELLANT

HAMZA RUMBA MAGARI & 16 OTHERS & 16 OTHERS & 16 OTHERS & 16 OTHERS 2ND APPELLANT

AND

BRINKS SECURITY SERVICES LIMITED RESPONDENT

(Being an appeal from the judgment of Hon. T. N. Sikiyian delivered on 21 November 2024 at Voi CMELRC No. E003 of 2022)

JUDGMENT

1. The appeal arises from the judgment delivered on 21 November 2024, in *Voi CMELRC No. E003 of 2022*. The 18 appellants seek to have the judgment reviewed and their claims allowed with costs.
2. The background of the appeal is a claim that the appellants filed before the trial court. Their case was that they were employed by the respondent on different dates as night or day guards along Mackinnon Road to the Manyani pipeline at a wage of ksh.10 500 per month. Work hours were 12 instead of 10, stipulated under the Security Protective Order, and without overtime pay. They claimed that they were not allowed to take annual leave. On 1 March 2022, the respondent terminated their employment without due process or payment of terminal dues. These included salary arrears for 10 days.
3. Each appellant particularized their claim. In the case of Wilson M. Ndolo, the 1st appellant, his claims included the following;
 - a. Notice pay ksh.10,500,
 - b. Salary for February 2022 ksh. 10,500,



- c. Accrued leave for 3 years ksh.26,950,
 - d. Service pay for 3 years ksh.15,750
 - e. Overtime worked ksh.161,740,
 - f. 12 months compensation ksh.126,000,
 - g. Certificate of service;
 - h. Costs of the suit.
4. In response, the respondent admitted the appellants were employed on 1 March 2018. However, work hours were not 12, as alleged. Employment was not terminated on 1 March 2022; the respondent's contract with Kenya Pipeline ended, and notice was served upon all the appellants. The claims made are not justified and should be dismissed.
 5. The respondent responded to all the appellants' claims. Regarding the 1st appellant, the respondent stated that his February 2022 salary was paid in full, and a notice was issued. He had utilized all leave days, and there were payments to NSSF, so no service pay was due. Work hours were regulated by law, so there was no overtime. Employment terminated procedurally, and the compensation claim is not justified.
 6. In judgment, the learned magistrate heard the parties and held that the appellants failed to prove the claim for alleged unfair termination of employment and had no evidence. The respondent's resignation letters were produced, which the appellants alleged to be forged without producing evidence. One appellant, Patrick Mwaniki Fundi, testified that the respondent wanted to go deeply to Riley Falcon, yet these matters were not pleaded. Hence, under section 107 of the *Evidence Act*, the appellants failed to prove their case. The appellants admitted that Riley Falcon took over the tender for responses with Kenya Pipeline Company and most currently works for the new entity. Hence, there was no proof of unfair termination of employment.
 7. The trial court dismissed the claims, except for payment for days worked, leave balance, and certificate of service.
 8. Aggrieved by the judgment, the appellant has raised nine (9) grounds that the learned magistrate erred in law and fact in finding that the issue in dispute was leave, overtime, and service pay, yet failed to decide on each. The finding that the 2nd, 5th, 6th, 9th, and 14th appellants were not concerned with signing resignation letters drawn and produced by the respondent as a precondition for payment of their terminal dues was in error.
 9. Other grounds of appeal are that the trial court erred in finding that the issue in dispute was between Riley Falcon, who was not a party to the dispute. Relying on Section 107 of the *Evidence Act* was in error as it does not apply in the context of the *Employment Act*, and the cause of action arose from an employment relationship. As the custodian of employment records, the respondent did not produce them. No letter or notice terminating employment was produced, and the alleged forgery of documents was reported to the police. The findings by the trial court were in error and should be reviewed.
 10. The appellants submitted that they pleaded and claimed for payment of accrued leave days, overtime and service pay. The fact of any redeployment to a third party did not bar the respondent from paying accrued terminal dues. Whether there was redeployment or not, the appellants were entitled to their earnings at the end of their employment. The findings that these claims were not proved without the



respondent filing any work records were in error. Reliance on Section 107 of the *Evidence Act* instead of Sections 10(7) and 74 of the *Employment Act* was in error. This resulted in unfair termination of employment and non-payment of accrued terminal dues.

11. The respondent kept a detailed check on each appellant's overtime claim. In *Yaa v SGA Security Solutions Limited* [2022] eKLR, the court held that the employer has the legal duty to produce work records. In this case, the claims by the appellants were not challenged without the respondent producing the work records.
12. Regarding the findings of desertions, coercion, and forgery of signatures, these were all generic and issued by the respondent. The applicants reported the forgery to the police. The appellants testified that they were made to sign these letters as a condition to pay their terminal dues, which were eventually not paid. Without proof of the appellants being paid their full terminal dues, the claims made should have been awarded as pleaded, as held in *Boniface Francis Mwangi v BOM Iyego Secondary School* [2019] eKLR.
13. The respondent submitted that on the claim for notice pay, under section 36 of the *Employment Act*, the appellants had the burden of proof that they were not paid. They admitted that they were issued a notice to report to Nairobi for redeployment and that their wages were paid. Notice pay is not due.
14. The salary arrears for February 2022 were admitted as paid. It does not accrue, and claiming it is to seek unjust enrichment.
15. The respondent submitted that the employment ended lawfully with redeployment, where some appellants resigned and hence could not claim compensation. The claim for overtime is addressed in the case of Kenya *Union of Domestic Hotels Educational Institutions, Hospitals and Allied Workers v Charles Waitbaka Goko t/a Apple Bees and Restaurant* [2013] eKLR, that the tendency of employees seeking overtime to throw all public holidays in the calendar and all the hours beyond the agreed working hours on the clock is not justified. This is factually and justifiably not credible.
16. In *Stephen Maganga Shungula v Rift Valley Railways (Kenya) limited* [2019] eKLR, the court held that the overtime figures claimed were not supported by timesheets. The employee did not accurately tally the overtime hours claimed to determine the total. Such general claims cannot be allowed.
17. The respondent submitted that the claim for overtime work is a continuing injury, was not claimed within 12 months as set out under section 90 of the *Employment Act*, and should be dismissed.
18. Service pay on the face of the respondent, paid to NSSF, is not justified.

Determination

19. This is a first appeal. The court must reassess, review, and reevaluate the record and draw conclusions.
20. The appellant's case is that on 1 March 2022, the respondent terminated their employment unfairly and failed to pay their terminal dues. They have claimed payment for their wages for February 2022, notice pay, accrued leave days, service pay, overtime worked, and compensation.
21. The respondent asserts that the salary for February was paid in full, that there was notice before employment was terminated, and that no pay is due. The respondents' contract with Kenya Pipeline Company ended, and through a notice dated 1 February 2022, they were redeployed to the company taking over, Falcon Limited. They were to report to the Nairobi office for redeployment, yet they failed to report. The 2nd, 5th, 6th, 9th, 14th, and 15th appellants opted to resign. The rest opted not to report for duty for redeployment.



22. In their evidence, the appellant admitted they were paid their February wages in June 2022. That resolved the matter.
23. On the claim for notice pay, the respondent has submitted that some appellants resigned from their employment upon notice to report to Nairobi for redeployment. Others opted not to report to work, hence deserted their duty.
24. The respondent produced letters dated February 2022 indicating that the notice was terminated on 28 February 2022. Then, the respondent offered the applicants another assignment and redeployment. Each applicant was to report to the head office for redeployment.
25. The court has reviewed each notice dated 12 February 2022, which is signed by each appellant and dated.
26. As submitted by the respondent, some appellants, including the 2nd, 5th, 6th, 9th, 14th, and 15th appellants, signed letters of resignation. However, they have challenged these resignations because they were coerced to sign them to be paid their terminal dues. There is a report to the police that their signatures were forged.
27. On the one hand, the 2nd, 5th, 6th, 9th, 14th, and 15th appellants claim that they were made to sign this resignation letter to be paid and that these are forgeries. One explanation has to hold.
28. The explanation that the 2nd, 5th, 6th, 9th, 14th, and 15th appellants signed their resignation letters to be paid their terminal dues is more plausible. They had been notified that the KPC contract with the respondent had been terminated and were to report to the head office in Nairobi for redeployment. Alongside this was the new entity on board the KPC contract, Falcon Limited, which was willing to employ them. Going to Nairobi for redeployment or taking new employment was not reasonable or practical. The assertion that there were resignations to be paid terminal dues is reasonable.
29. In this regard, notice was issued, and upon their resignations, the 2nd, 5th, 6th, 9th, 14th, and 15th appellants' employment was terminated. They cannot claim notice pay or compensation.
30. However, despite the resignation, the 2nd, 5th, 6th, 9th, 14th, and 15th appellants are entitled to claim any accrued leave, overtime, and service pay as security guards. The trial court should have assessed these.
31. On the other appellants, the respondent asserts that after the notice dated 1 February 2022, they failed to report for duty for deployment. Notices for desertion of duty were issued, so employment was terminated regularly.
32. The respondent has not produced the employment contracts for the appellants. The allocation of the duty station is lacking due to the absence of a written contract. What is clear to the court is that the appellants were assigned duties at MacKinnon /Manyani. The notice to report to the head office for redeployment without considering the duty station supposed to be designated in the written contract is unreasonable and contrary to fair labour practices. Without the employer discharging its duty to issue a written contract, expecting the appellants to end their employment on 28 February 2022 and immediately report to the head office on 1 March 2022 for redeployment is equally unreasonable and constitutes an unfair labour practice. This cannot be justified in a democratic society.
33. As noted in notices dated 9 March 2022, the desertion of duty can only be viewed in this context. The respondent cannot sanitise its legal lapses through a notice of alleged desertion of duty.



34. In any event, desertion from duty is considered gross misconduct under section 44 of the *Employment Act*. Before issuing such notice, the employee must be summoned to explain their failure to attend duty in accordance with section 41(2) of the *Employment Act*. The legal process must be followed, as established in *Brandlife Kenya Limited v Koskei* [2025] KECA 100 (KLR). The employee must be notified to attend and present their case. If the employee fails to attend, the employer must terminate employment and inform the Labour Officer. The notice to the Labour Officer should be issued only after the employer has invited the employee to attend and show cause.
35. In the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, the court held that,
- There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act Rules*. Finally, the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee.
36. In this case, a critical and mandatory step was overlooked. The appellants, who received alleged desertion notices, including the 1st, 3rd, 4th, 7th, 8th, 10th, 11th, 12th, 13th, 16th, 17th and 18th, are justified in claiming notice pay and compensation. These appellants had worked for the respondent, as admitted, from 2018 to 2022. Notice pay is owed to each at ksh. 10,500, and compensation at three months' gross wage of ksh. 31,500 each.
37. On the claim for accrued leave pay for 3 years, as submitted by the appellants, the employer is legally obligated under sections 10(7) and 74 of the *Employment Act* to produce work records. Unlike a commercial transaction that requires proof under the principles of the *Evidence Act*, the employment relationship is governed by the *Employment Act*.
38. The employer must prove that the employee took their annual leave or was compensated.
The respondent submitted various work records in this regard;
39. Magari Hamza Rumba's annual leave application is dated 24 May 2021. It is not signed in approval, and the applicant's signature is at variance with the usual one in other documents.
40. The Fundi Patrick Mwaniki application dated 27 September 2021 is also not approved, and the signature applied is at variance with his usual one in other documents.
41. Akiti Alphonse's application, dated 29 July 2021, is also not approved, and the signature applied was manipulated.
42. The court discerns this trend in the records submitted in this regard. The respondents are ready and willing to manipulate records to support their case.
43. The right to take annual leave is lawful and secured under Section 28 of the *Employment Act*. Where not taken for over 18 months, this can't be recovered unless there is evidence that an application was declined. Based on the manipulated records, the appellants cannot only claim for 33 days of annual leave.



44. Based on the monthly wage of ksh. 10,500, each is entitled to ksh. 11,550 for 33 days of accrued annual leave.
45. Regarding overtime claims, the employer is responsible for maintaining work records. However, overtime accrued on a daily, weekly, or monthly basis. This constitutes a continuing injury as defined under Section 89 of the Employment Act. It must be claimed within 12 months from the date of cessation. In the cases of Charles v Cheto [2025] KECA 784 (KLR) and Kenya Railways Corporation v Ododa & 216 others [2024] KECA 1620 (KLR), the courts have affirmed that a continuing injury must be addressed within 12 months from the date of cessation.
46. Equally, an employee should not stand back and wait until the end of his employment to make a general claim of overtime work as submitted by the respondent in the case of Stephen Maganga Shungula v Rift Valley Railways (Kenya) Limited [2019] eKLR. The employee who works overtime must seek to secure his rights and the protection of section 46(h) of the Employment Act.
47. In this case, the appellants testified that they clock in daily at work, and the respondent has not submitted such records. Under Section 89, the appellants can only justify a claim for 12 months.
48. On a monthly wage of ksh. 10,500, working overtime for 4 hours is $10,500/26 \times 4 \times 12 \times 1.75 = 33,924$ for each appellant.
49. For service pay, security guards are governed by a distinct set of Wage Orders, separate from those applicable to other employees, namely the Protection Security Wages Orders. Under these Wage Orders, the sector has negotiated the payment of service pay at the end of employment. This payment accrues even when the employer has remitted statutory dues. See Kenya National Private Security Workers Union v Hatari Security Limited [2019] KEELRC 1320 (KLR) and the case of Nakuru Teachers Training College v Shikopo [2024] KEELRC 2859 (KLR).
- The rate applied is 15 days for every full year worked.
50. The respondent submitted that the appellants worked from 1 March 2018 to 28 February 2022, 4 years. At a wage of Ksh. 10,500, each appellant's due service pay is ksh. 21,000.
- The appeal is successful, and the appellants are entitled to costs.
51. Accordingly, judgment in *Voi CMELRC No. E003 of 2022* is hereby set aside, and the following orders are issued;
- a. Each appellant is awarded accrued leave at ksh 11,550,
 - b. Each appellant is awarded overtime pay ksh. 33,924,
 - c. Each appellant is awarded service pay ksh 21,000,
 - d. The 1st, 3rd, 4th, 7th, 8th, 10th, 11th, 12th, 13th, 16th, 17th, 18th appellants are awarded the following;
 - i. Compensation ksh.31,500,
 - ii. Notice pay ksh 10,500,
 - e. The applicants are awarded costs of the appeal.

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

M. MBARŪ



JUDGE

In the presence of:

Court Assistant: Japhet

